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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 841.

THE UNITED STATES, APPELLANT,

vs.

HENRY E. McKEE.

FILED OCTOBER 9, 1877.

No. 880.

HENRY E. McKEE, APPELLANT,

vs.

THE UNITED STATES.

FILED OCTOBER 13, 1877.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

Dismissed

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1 In the Court of Claims, December term, 1870.

HENRY E. McKEE
vs.
THE UNITED STATES. } No. 6194.

I. *Petition.—Filed July* 14, 1870.

To the honorable Judges of the Court of Claims:

The petition of Henry E. McKee, a citizen of the United States, resident in Fort Smith, Arkansas, sheweth:

That, on the 20th day of June, 1864, and on the 18th day of August, 1864, contracts, copies of which are annexed to and made a part of this petition, marked respectively "A" and "B," were made and executed by and between Captain Greene Durbin, assistant quartermaster United States volunteers, of the one part, and Henry E. McKee, the claimant in this case, of the other part, for the cutting and delivery of
2 certain quantities of hay at certain points specified in said contracts, and that said contracts were made under the direction and approval of General John M. Thayer, commanding the United States forces in the military district of the frontier.

That at the time of the making and execution of said contracts, active hostilities existed between the armies of the United States and the military forces of the late so-called Confederate States, in that portion of the Indian Territory within which said contracts were to be performed.

That both of said contracts contained a stipulation guaranteeing the protection of the petitioner in the performance of said contracts, in the following words: "It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the
3 government to protect the contractor while engaged in the fulfilment of this contract."

That the delivery of hay at and near Fort Gibson, and at Hudson's Crossing and Cabin Creek, as provided for in said contracts, was prevented for the period of thirty (30) days in consequence of the neglect of the proper military authorities of the United States to furnish guards and escorts for the protection of the contractor, as required by the terms of said contracts, and which were duly requested by the petitioner, and by reason of the seizure and use at various times by the armies of the United States for military purposes of his wagons, mules, and horses employed in the performance of said contracts; and that it was
4 impossible for the petitioner, on account of the remoteness of said places from settlements, to obtain horses, wagons, and mules in place of those so used by the government.

That on the second day of September, 1864, an attack was made by the rebel forces on the camp of petitioner, near Fort Gibson, by reason of which six hundred (600) tons of hay and other property, consisting of wagons, harness, hay-forks, and a mule, necessarily employed by the petitioner in the performance of the contract dated June 20, 1864, were destroyed, or taken by said rebel forces; that the Government of the United States has paid claimant for said six hundred (600) tons of hay, but has not paid the petitioner for said other property, amounting in value to ten hundred and ninety-nine dollars ($1,099).

5 That on the morning of the 19th day of September, 1864, an attack was made by the rebel forces at Cabin Creek, a place

designated in the said contract of August 18, 1864, for the delivery of hay, and property of the petitioner consisting of horses, mules, wagons, mowing-machines, provisions, forage, and other property necessarily used by the petitioner in the performance of said contract, amounting in value to fifteen thousand six hundred and seventy-four dollars ($15,674), was destroyed, or carried away by said rebel forces; and that the said petitioner has not been paid by the Government of the United States for said property, or any part thereof.

That afterwards, on the same day within a few hours of the attack by the rebel forces at Cabin Creek, under the apprehension of an
6 immediate attack by said rebel forces, the officer in command of the United States forces at Hudson's Crossing, a place designated in said contract dated August 18, 1864, for the delivery of hay, ordered the abandonment of said place, and that in compliance with said order the said place was abandoned, by reason of which the petitioner lost property necessarily employed in the performance of said contract, amounting in value to two thousand five hundred dollars, no portion of which said amount has been paid to the petitioner by the Government of the United States.

That the claim of the petitioner for losses under said contracts was duly presented to the Quartermaster-General of the United States
7 for payment soon after said losses were incurred, and has been considered by the said Quartermaster-General and by the proper accounting-officers of the government, and that the sum of eighteen thousand eight hundred and eighty-five dollars ($18,885) has been paid by the Government of the United States for losses incurred under said contracts, but that no portion of the amounts claimed in this petition has been paid by said government.

That the Government of the United States did not, although requested, give sufficient protection to the petitioner, as provided for in said contracts, by reason of which the losses complained of in this petition were incurred.

That although the petitioner was ready and offered to perform said contracts, the officers of the United States refused to fulfil
8 said contracts and refused to give escorts for the protection to the petitioner in the cutting and delivery of said hay, as provided for in said contracts, whereby the petitioner was prevented from delivering three thousand and eighty-seven (3,087) tons of hay, as provided for in said contracts, and thereby the petitioner suffered a loss of profit of ten dollars on each ton of hay remaining to be delivered under said contracts, amounting to thirty thousand eight hundred and seventy ($30,870) dollars.

That there has not been returned to the petitioner any portion of said property taken, nor has he received compensation for any property destroyed for which he claims payment in this petition.

Your petitioner further shows that he has at all times borne
9 true allegiance to the Government of the United States, and that he has not in any way aided, abetted, or given encouragement to the enemies of said government, or to any person or persons acting in hostility thereto.

The petitioner further shows that his claim against the United States under said contracts has been mortgaged to the First National Bank of Fort Smith, Arkansas, to secure the payment of a debt due to the said bank from the firm of H. E. McKee & Co.

Your petitioner further shows that the sum due to him from the United States on the said contracts is fifty thousand one hundred and forty-

three dollars; wherefore your petitioner prays for a judgment of
10 this honorable court against the United States for the sum of fifty thousand one hundred and forty-three dollars.

HENRY E. McKEE.

E. P. NORTON,
S. W. JOHNSTON,
Attorneys for Petitioners, Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Henry E. McKee, being duly sworn, deposes and says that he is the claimant named in the foregoing petition; that no assignment or transfer of said claim or any part thereof has been madeexcept as set forth in said petition; that he is justly entitled to the amount claimed therein from the United States after allowing all just credits and offset'; and that the facts stated in said petition as of his own knowledge are
11 true, and those stated on the information of others he believes to be true.

HENRY E. McKEE.

Sworn to and subscribed before me this 25th day of June, 1870.
[SEAL.] JOHN H. McCUTCHEN,
Notary Public.

EXHIBIT A.

Articles of agreement entered into this 20th day of June, 1864, between Captain Greene Durbin, assistant quartermaster of volunteers in the service of the United States of America, of the one part, and Henry E. McKee, of Fort Gibson, Indian Territory, of the other part.

This agreement witnesseth that the said Captain Greene Dur-
12 bin, for and on the behalf of the United States of America, and the said Henry E. McKee, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutally covenant and agree, to and with each other, as follows, viz:

I. That the said Henry E. McKee shall deliver at the post of Fort Gibson one thousand tons of hay; and further, shall deliver, at or within the distance of seven miles from said post, the further quantity of two thousand tons of hay, said two thousand tons of hay to be put up in good stacks of not less than one hundred tons to the stack and not less than four hundred tons at one point.

The delivery of the said three thousand tons shall commence on or before the 15th day of July, and be all delivered on or before
13 the 1st day of September, 1864.

The said Henry E. McKee agrees to furnish the additional quantity of three thousand tons of hay or less, as the assistant quartermaster may elect, upon receiving from the said quartermasters timely notices, either at the post of Fort Gibson or within a distance of seven miles from said post, for which additional amount the said Henry E. McKee shall be paid as set forth in paragraph II of this notice.

II. The said Henry E. McKee shall receive thirty dollars per ton for each and every ton of hay delivered at the post of Fort Gibson, and twenty-two dollars per ton for each and every ton of hay delivered within a distance of seven miles, subject to the restrictions
14 in paragraph I as to the quantity to be delivered at any one point.

III. Payments shall be made upon the acceptance of each one thousand tons in certified accounts, or such funds as the assistant quartermaster may have for that purpose.

IV. In case of failure or deficiency in the quality or quantity of hay stipulated to be delivered, then the assistant quartermaster shall have power to supply the deficiency by purchase, special contract, or otherwise, and the said Henry E. McKee shall be charged with the difference of cost.

V. It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractor while engaged in the fulfillment of this contract.

VI. No member of Congress, officers, or agents of the government, or any person employed in the public service shall be admitted to any share herein, or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

GREENE DURBIN,
Capt. and A. Q. M., U. S. Vols.
HENRY E. McKEE,
Fort Gibson, Indian Territory.

In presence of witnesses to both signatures—
THOMAS G. WILDMAN.
CHARLES N. HAHN.

Approved:

JOHN M. THAYER,
Brig. General, Commanding.

EXHIBIT B.

Articles of agreement entered into this 18th day of July, 1864, between Captain Greene Durbin, assistant quartermaster of the United States Volunteers, of the one part, and Henry E. McKee, of Fort Gibson, Indian Territory, of the other part.

This agreement witnesseth that the said Captain Greene Durbin, for and on behalf of the United States of America, and the said Henry E. McKee, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

I. That the said Henry E. McKee shall deliver at Cabin Creek, forty (40) miles from Fort Gibson, C. N., and at Hudson's Crossing of the Neosho River, seventy (70) miles distance from the fort, and each of said points on the direct route of supplies from Fort Scott, Kansas, to Fort Gibson, C. N., four thousand (4,000) tons of timothy or prairie hay, two thousand (2,000) tons to be delivered at each of the above-mentioned points.

The delivery of each two thousand tons shall commence on or before the 10th day of August, 1864, and all delivered on or before the 25th day of September, 1864.

The hay to be put up in good stacks of not less than one hundred tons to the stack, and all of said hay to be stacked at the posts established at those points.

II. The said Henry E. McKee shall receive thirty dollars ($30) per ton for each and every ton of hay delivered and accepted.

18 III. Payments to be made upon the acceptance of each one thousand tons, in certified accounts, or such funds as the assistant quartermaster may have for that purpose.

IV. It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractors while engaged in the fulfilment of this contract.

V. No member of Congress, officer, or agent of the government, or any person employed in the public service shall be admitted to any share or any benefits which may arise herefrom.

In witness whereof the undersigned have hereunto placed
19 their hands and seals the day and date first above written.

(Signed) GREENE DURBIN,
Capt. and A. Q. M., U. S. Vols.

(Signed) HENRY E. McKEE,
Fort Gibson, Indian Territory.

In presence of witnesses to both signatures.
ELI EVANS.

20 II. *Traverse.—Filed Sept.* 12, 1870.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United Strtes are indebted to the said claimant in the sum of fifty thousand one hundred and forty-three dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

21 III. *Counter-claim of the defendants.—Filed May* 3, 1875.

The said defendants, by John Goforth, Assistant Attorney-General, come and say that the said plaintiff, before and since the commencement of this suit, was, and still is, indebted to the said defendants in a large sum of money, to wit, $34,713.00, for moneys paid to the said claimant by the accounting-officers of the government, without warrant of law, the said payments being as follows:

For 600 tons hay, destroyed at Fort Gibson	$12,600 00
" 115 tons " " " Cabin Creek	3,450 00
" 70 tons " abandoned " Hudson's Crossing	1,890 00
" property destroyed at Cabin Creek	15,674 00
" " " " Fort Gibson	1,099 00
	34,713 00

22 Wherefore the Assistant Attorney-General prays that judgment be entered against claimant for the sum of $34,713.00.

JOHN GOFORTH,
Ass't Att'y Gen'l.

23 IV. *Amenaed petition.—Filed March* 16, 1876.

To the honorable Judges of the Court of Claims:

The amended petition of Henry E. McKee, a citizen of the United States, resident in Fort Smith, Arkansas, showeth, that on the 20th day of June, 1864, and on the 18th day of July, 1864, contracts, copies of which are annexed to and made a part of this petition, marked respectively "A" and "B," were made and executed by and between Captain Greene Durbin, assistant quartermaster, United States Volunteers, of the one part, and your petitioner, Henry E. McKee, the claimant in this case, of the other part, for the cutting and delivery of certain quantities of hay at points specified in said contracts; and that said contracts were made under the direction and approval of Gen. John M. Thayer, commanding the military forces of the United States in the District of the Frontier, which included the points specified in said contracts for the cutting and delivery of said hay; that at the time of the making and execution of said contracts active hostilities existed between the armies of the United States and the military forces of
24 the late so-called Confederate States in that portion of the Indian Territory within which said contracts were to be performed.

That both of said contracts contained a stipulation guaranteeing the protection of the petitioner in the performance of said contracts, in the following words: "It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractors while engaged in the fulfilment of this contract."

That the delivery of hay near Fort Gibson, and at Cabin Creek and Hudson's Crossing, as provided for in said contracts, was prevented for the period of about thirty (30) days (including the detention at Fort Gibson and Fort Scott of the haying parties of the petitioner, destined for Cabin Creek, Hudson's Crossing, and a point within seven miles of Fort Gibson), in consequence of the neglect of the proper military authorities of the United States at Fort Gibson and Fort Scott to furnish sufficient guards and escorts for the protection of the contractor, as required by the terms of said contracts, and which were duly requested by the petitioner, and by reason of the military authorities requiring his employés to stop the cutting and delivery of hay and to work for the United States; and by reason of the seizure and use at various times by the armies of the United States, for military purposes, of his wagons, horses, and mules, employed in the performance of said contracts; and the petitioner further states that, on account of the remoteness of the said places from settlements, it was impossible to obtain men, horses, mules, or wagons to supply the place of those seized or used by the government, as aforesaid. That the performance of said contracts was also interfered with and prevented as follows, that is to say: On the 2d, and again on the 16th day of September, 1864, the haying parties of the petitioner were attacked near Fort Gibson and driven from their work by the rebels; and on the 19th day of September, 1864, an attack
25 was made by the rebel forces on his haying party at Cabin Creek, and portions of the military guard and of the employés of your petitioner were killed or captured and the rest driven from that point towards Hudson's Crossing; and that afterwards, on the same day, under the apprehension of an immediate attack by said rebel forces upon the troops and haying party at Hudson's Crossing, Col. John B. Wheeler, of the 13th Kansas Volunteers, the ranking officer present, ordered the abandonment of the military and haying camp, and directed the troops and haying party to proceed forthwith to Fort Scott, Kansas.

Your petitioner further states that although he was prepared and ready and offered to perform said contracts, the officers of the United States refused to fulfil said contracts, and, although requested by petitioner, refused to give sufficient guards and escorts for his protection in the cutting and delivery of said hay, as provided in said contracts, whereby your petitioner was put to large additional costs and charges in the cutting and delivery of the hay cut, and was prevented from cutting and delivering four hundred (400) tons of hay near Fort Gibson, seven hundred and fifty-seven (757) tons at Cabin creek, and nineteen hundred and thirty (1,930) tons at Hudson's Crossing, as provided in said contracts, and thereby your petitioner suffered a loss of profit of six dollars per ton on the four hundred (400) tons of hay remaining to be delivered near Fort Gibson under contract of June 20, 1864, and of eleven dollars per ton on the twenty-six hundred and eighty-seven (2,687) tons of hay remaining to be delivered at Cabin Creek and Hudson's Crossing under contract of July 18, 1864.

Your petitioner states that he has at all times borne true allegiance to the Government of the United States, and that he has not in any way aided, abetted, or given encouragement to the enemies of said government, or to any person or persons acting in hostility thereto.

Your petitioner states that, since filing the original petition
26 herein, he is informed and believes the receiver of the First National Bank of Fort Smith has, under the direction of the district court of the United States for the western district of Arkansas, sold the notes, which the mortgage given said bank was intended to secure, to W. N. Ayres, and the said bank has now no interest therein.

Petitioner further states that he is informed and believes the United States has heretofore obtained a judgment against him and others as sureties on the bond of one Matthew Gray, and a like judgment on the bond of one Joseph S. C. Rowland, both government officers; that he does not know the dates or amounts of said judgments, but he believes that the first was for about two hundred and fifty dollars, and the latter for about thirteen hundred dollars; and, if they are and should remain unpaid, he will, in the event of a judgment in his favor in this case, call the attention of the Secretary of the Treasury to said judgments, and comply with the terms of an act of Congress entitled "An act to provide for deducting any debt due the United States from any judgment recovered against the United States by such debtor," approved March 3, 1875.

Your petitioner further shows that by reason of the violation of said contract and the loss of profits, as aforesaid, he is entitled to a judgment, and that there is due him on said contracts the sum of thirty-one thousand nine hundred and fifty-seven dollars. Wherefore your petitioner prays a judgment of this honorable court against the United States for the sum of thirty-one thousand nine hundred and fifty seven dollars ($31,957.00).

H. E. McKEE.

S. W. JOHNSTON,
Attorney for Petitioner, Washington, D. C.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Henry E. McKee, being duly sworn, deposes and says that he
27 is the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, has been made, except as set forth in said petition; that he is justly entitled to the

amount claimed therein from the United States, after allowing all just credits and offsets (save such offsets as may be just and proper after judgment, and which are stated in said petition), and that the facts stated in said petition as of his own knowledge are true, and those stated on the information of others he believe to be true.

H. E. McKEE.

Sworn to and subscribed before me this 15th day of March, 1876.
[L. S.] AARON BRADSHAW,
Notary Public.

28 EXHIBIT A. (Copy.)

Articles of agreement entered into this twentieth day of June, eighteen hundred and sixty-four, between Captain Greene Durbin, ass't quartermaster of vol's, in the service of the United States of America, of the one part, and Henry E. McKee, of Fort Gibson, Indian Territory, of the other part.

This agreement witnesseth that the said Capt. Greene Durbin, for and on behalf of the United States of America, and the said Henry E. McKee, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant & agree to & with each other, as follows, viz:

I. That the said Henry E. McKee shall deliver at the post of Fort Gibson one thousand tons of hay, & further, shall deliver at or within the distance of seven miles from said post the further quantity of two thousand tons of hay.

Said two thousand tons of hay to be put up in good stacks, of not less than one hundred tons to the stack, and not less than four hundred tons at any one point.

The delivery of said three thousand tons shall commence on or before the fifteenth day of July, and be all delivered on or before the 1st day of September, 1864. The said Henry E. McKee agrees to furnish the additional quantity of three thousand tons of hay, or less, as the ass't quartermaster may elect, upon receiving from the said quartermaster timely notice, either at the post of Fort Gibson or within a distance of seven miles from said post, for which additional amount the said Henry E. McKee shall be paid as set forth in paragraph II of this contract.

II. The said Henry E. McKee shall receive thirty dollars per ton for each & every ton of hay delivered at the post of Fort Gibson, & twenty-two dollars per ton for each and every ton of hay delivered within a distance of seven miles, subject to the restriction in paragraph I as to the quantity to be delivered at any one point.

III. Payment shall be made upon the acceptance of each one thousand tons, in certified accounts, or such funds as the ass't quartermaster may have for that purpose.

IV. In case of failure or deficiency in the quality or quantity of
29 hay stipulated to be delivered, then the ass't quartermaster shall have power to supply the deficiency by purchase, special contract, or otherwise, & the said Henry E. McKee shall be charged with the difference of cost.

V. It is expressly understood by the contracting parties hereto that sufficient guards & escorts shall be furnished by the government to protect the contractor while engaged in the fulfilment of this contract.

VI. No member of Congress, officer, or agent of the government, or

any person employed in the public service, shall be admitted to any share herein or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands & seals the day & date first above written.

GREENE DURBIN, [SEAL.]
Capt., A. Q. M., U. Vols.
HENRY E. McKEE, [SEAL.]
F't Gibson, Ind. T'y.

In presence of (witness' to both signatures):

THOS. G. WILDMAN.
CHAS. N. HAHN.

Approved:

JOHN M. THAYER,
Brig. Gen'l, Com'd'g.

EXHIBIT B.

Articles of agreement entered into this 18th day of July, one thousand eight hundred and sixty-four, between Captain Greene Durbin, assistant quartermaster of United States volunteers, of the one part, and Henry E. McKee, of Fort Gibson, Indian Territory, of the other part.

This agreement witnesseth that the said Captain Greene Durbin, for and on behalf of the United States of America, and the said Henry E. McKee, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

1. That the said Henry E. McKee shall deliver at Cabin Creek, (40) forty miles from Fort Gibson, C. N., and at Hudson's Crossing of the Neosho River, seventy (70) miles distant from the fort, and each of said points, on the direct route of supplies from Fort Scott, Kansas, to Fort Gibson, C. N., four thousand tons of timothy or prairie hay; two thousand tons to be delivered at each of the above-mentioned points.

The delivery of each two thousand tons shall commence on or before the tenth day of August, one thousand eight hundred and sixty-four, and be all delivered on or before the twenty-fifth day of September, 1864.

The hay to be put up in good stacks of not less than one hundred tons to the stack, and all of said hay to be stacked at the posts established at those points.

The said Henry E. McKee shall receive thirty (30) dollars per ton for each and every ton of hay delivered and accepted.

Payments to be made upon the acceptance of each one thousand tons in certified accounts, or such funds as the assistant quartermaster may have for that purpose.

It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractor while engaged in the fulfillment of this contract.

No member of Congress, officer, or agent of the government, or any person employed in the public service, shall be admitted to any share or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

GREENE DURBIN, [SEAL.]
Capt., A. Q. M., U. S. Vols.
HENRY E. McKEE, [SEAL.]
Fort Gibson, Ind. Ter.

In presence of (witness' to both signatures):
ELIE EVANS.
CHAS. E. BODINE.

Approved:

JOHN M. THAYER,
Brig. Gen'l of Vol's, Com'ding.

31 V. *Pleas to amended petition.—Filed Dec. 2, 1876.*

Traverse. The said defendants, by the Assistant Attorney-General, come and deny each and every the allegations contained in the amended petition, and say that there is not due to the said plaintiff the sum of $31,957 set forth in said amended petition, nor any part thereof; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them.

Statute of limitations. And for a further plea in this behalf the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said several supposed causes of action in the said amended petition mentioned (if any such there were or still are) did not, nor did any or either of them, accrue to the said plaintiff at any time within six years next before the filing of the said amended petition; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them.

Set-off and counter-claim. And for a further plea in this behalf the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said plaintiff, before and at the time of filing of said amended petition, was and still is indebted to the said defendants in a large sum of money, to wit, $34,713, for moneys paid to the said plaintiff by the accounting-officers of the United States without warrant of law, the said payments being as follows:

For 600 tons hay destroyed at Fort Gibson	$12,600 00
For 115 tons hay destroyed at Cabin Creek	3,450 00
For 70 tons hay abandoned at Hudson's Crossing	1,890 00
For property destroyed at Cabin Creek	15,674 00
For property destroyed at Fort Gibson	1,099 00
	34,713 00

The said property and hay being at the time of its destruction and abandonment in the possession, custody, and control and being the property of the plaintiff; wherefore the Assistant Attorney-General prays that judgment be entered against the plaintiff for the sum of $34,713.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Dec. 2, 1876.

32 VI. *Replication.—Filed January* 3, 1877.

I. And the said plaintiff as to the plea of the said defendants by them secondly above pleaded, as to the amended petition, saith that he, the said plaintiff, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against them the said defendants, because he saith that the said several causes of action in the said amended petition mentioned, and each and every of them, did accrue to the said plaintiff within six years before the commencement of this suit, in manner and form as the said plaintiff hath above complained against the said defendants.

33 II. And the said plaintiff, as to the set-off and counter-claim, being the plea by the said defendants thirdly above pleaded, as to the amended petition, denies that he was or is indebted to the said defendants in the said sum of $34,713.00, or in any other sum whatever, as alleged in the said plea of set-off and counter-claim. He denies that the said sum, or any part thereof, was paid to him by the accounting-officers of the United States without warrant of law; and he alleges that the said sum of $34,713.00, and every part thereof, was voluntarily and lawfully paid to him by the defendants, by way of reimbursement and compensation for actual expenses and losses of the plaintiff in and about the performance and attempted performance of valid contracts between plaintiff and defendants, which, before said payments,
34 had been broken by the defendants; the said contracts being the same mentioned in the petition and amended petition herein.

H. E. McKEE.

S. W. JOHNSTON, *Att'y.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

Henry E. McKee, being duly sworn, deposes and says that he is the claimant named in the foregoing replication, and that the facts in said replication stated as of his own knowledge are true, and those stated on the information of others he believes to be true.

Sworn to and subscribed before me this 3d day of January, A. D. 1877.

JOHN RANDOLPH,
Ass't Cl'k C't of Claims.

35 VII. *Amendment to petition.—Filed Jan'y* 8, 1877.

By leave of the court the plaintiff amends his original and amended petition herein by striking out all allegations as to an alleged mortgage, and as to proceedings under the same, and inserting the following:

"And the plaintiff further alleges that, by a paper dated at Fort Smith, Arkansas, April 4, 1868, the plaintiff sold and assigned to the First National Bank of Fort Smith, Arkansas, a claim for thirty-eight thousand four hundred and twenty-four dollars ($38,424), arising out of the contract sued upon in this action, the said claim so sold and
36 assigned as aforesaid, being, at the date of said sale and assignment, in the hands of Sanders W. Johnston for collection, and then pending before the accounting-officers of the Treasury of the defendants for settlement; and the plaintiff further alleges that the said sale and assignment embraced no other part of plaintiff's claim in this action."

S. W. JOHNSTON,
Att'y for Plaintiff.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Henry E. McKee, being duly sworn, deposes and says that he is the claimant named in the foregoing amendment; and that the facts stated in said amendment as of his own knowledge are true, and those stated on the information of others he believes to be true.

- H. E. McKEE.

Sworn to and subscribed before me this 6th day of January, A. D. 1877.

JOHN RANDOLPH,
Ass't Clk C't of C.

37 *VIII. Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. In the year 1864, Brigadier-General John M. Thayer was in command of the District of the Frontier, Department of Arkansas, with headquarters at Fort Smith, and Greene Durbin, captain and assistant quartermaster, was chief quartermaster of said district; which district was in the Indian Territory, south of Kansas and west of Arkansas.

II. During the spring, summer, and fall of 1864, owing to the low stage of water in the Arkansas River, it was impracticable for General Thayer's command to be supplied with grain, by way of that river, for the support of the animals; and the only other sources of supply of grain were Fort Scott and Fort Leavenworth, in Kansas. From those points to Fort Gibson was a long route, exceedingly difficult to protect and guard against raids from the rebel troops. Being thus cut off from any direct or safe communication with any base of supplies, said command was compelled to rely solely upon grass and hay for the support of the animals. Grass was very abundant in the Indian Territory during the year 1864, and hay could have been put up as late as the last of October. Owing to the condition of things thus stated, and as well to provide hay for present use as for the ensuing fall and winter for the posts in the command, the contracts annexed to the petition were entered into, as hereinafter set forth.

III. The said Durbin published in a newspaper at Fort Smith, Arkansas, the following advertisement:

"OFFICE CHIEF QUARTERMASTER,
"DISTRICT OF THE FRONTIER, DEP'T OF ARK.,
"*Fort Smith, May* 27, 1864.

"Sealed proposals will be received at this office until Monday, the 20th day of June, 1864, at 12 m., for furnishing 3,000 tons of hay, to be delivered at Fort Gibson, C. N. The bids will state at what date the delivery of the hay can commence, & no bid for the delivery of less than 200 tons will be received. The hay will be received by an agent of the undersigned, or by the post-quartermaster at Fort Gibson, who may be serving there at that time, and upon the delivery & acceptance of each two hundred tons, payment therefor will be made in such funds as the government may provide for the purpose.

"Bonds, with approved security, in the amount of five hundred dollars, for the performance of contracts to deliver lots of 200 tons, & in the sum of two thousand dollars upon contracts for the delivery of lots of 1,000 tons, will be required; bonds for the performance of contracts

for the delivery of other amounts than those above stated will be accordingly proportioned.

"The proposals must state within what time the hay will be
38 delivered at the post, & at what distance from Fort Gibson each lot of hay will be cut.

"Such military protection will be furnished as the necessities and interests of the service may admit.

"Proposals will be made out in duplicate, with a copy of this advertisement attached, and endorsed 'Proposals for furnishing hay.'

"The right is reserved to reject any & all bids, as the interests of the service may require.

"GREENE DURBIN,
"*Capt. & A. Q. M., Ch'f Q'rm'r.*"

IV. The claimant made the following proposal under said advertisement:

"FORT GIBSON, C. N., *June* 16, 1864.

"Capt. GREENE DURBIN,
"*A. Q. M., Chief Q'rmaster:*

"CAPTAIN: I will deliver, as per terms of your advertisement annexed, three thousand (3,000) tons of hay at the post of Fort Gibson, C. N., for thirty ($30) dollars per ton, or the same amount stacked within seven (7) miles of this post for twenty-two ($22) dollars per ton; or I will deliver any portion of the whole amount in the field or at the post, as may be desired, at the same prices. Delivering to commence by or before July 15, 1864.

"I offer as securities Perry Fuller & Edw. J. Brooks, both of Fort Smith, Arkansas.

"H. E. McKEE.

"I am prepared, on sufficient notice, to furnish an additional quantity of hay at same prices, not to exceed in amount three thousand tons.

"H. E. McKEE."

V. Thereafter the contract of June 20, 1864, annexed to the petition as Exhibit A, was entered into between said McKee and said Durbin.

VI. On the 17th of July, 1864, the said Brigadier-General Thayer caused the following order to be addressed by his acting adjutant-general to said Durbin:

"HEADQUARTERS DISTRICT OF THE FRONTIER,
"*Fort Smith, Ark., July* 17, 1864.

"The general commanding directs that you immediately take the necessary steps for the delivery of four thousand tons of hay at Cabin Creek, 40 miles from Fort Gibson, & at Hudson's Crossing of the Neosho River, 70 miles from the fort; two thousand tons to be delivered at each of said points. Should there not be time to advertise & regularly let the contract, you will make the arrangements for the delivery of the hay on the best terms you can, but not to exceed the contract-rates for the delivery of hay at Fort Gibson, C. N., under the existing contract.

"Very respectfully, &c.,
(Signed) "T. J. ANDERSON,
"*Major & A. A. Gen'l.*

"Capt. GREENE DURBIN,
Chief Quartermaster."

39 VII. On the said 17th of July, 1864, the said Durbin addressed to the claimant the following letter:

"OFFICE DEPOT QUARTERMASTER,
"*Fort Smith, Ark., July* 17, 1864.

"M'r HENRY E. MCKEE,
"*Contractor, &c., F't Gibson, C. N.:*

"You will deliver at Fort Gibson, C. N., by the 10th of September, 1864, as per the last clause of par. I of the contract entered into by and between you & myself, for supplying hay at Fort Gibson, C. N., on the 20th day of June, 1864, the additional amount of two thousand tons of good merchantable timothy or prairie hay. The hay will be inspected & accepted by the acting post-quartermaster at that post, or by my duly-authorized agent. Payment for the additional two thousand tons will be made as prescribed in paragraph I of said contract. You are also tendered the refusal of delivering & putting up at Cabin Creek, 40 miles from Fort Gibson, C. N., & Hudson's Crossing of the Neosho River, 70 miles distant from the fort, at each of said points on the direct route of supplies from Fort Scott, Kansas, to Fort Gibson, four thousand tons of timothy or prairie hay, two thousand tons to be delivered at each point by the 25th of September, & the delivery to commence by the 10th of August, 1864. For each one thousand tons of hay delivered and accepted at said points you will be paid the sum of thirty dollars per ton, in such funds as the U. S. may furnish for that purpose.

"You will inform me without any delay of your acceptance of this offer, and, if accepted, you will inclose to me a guarantee in duplicate, duly stamped, in the sum of six thousand dollars, and signed by good and sufficient surities for the faithful performance of your subsequent agreement. The guarantee will be in the enclosed form.

"Respectfully, your ob't serv't,

"GREEN DURBIN,
"*Capt. & Ass't Q'rm'r, U. S. V.*"

VIII. On the 23d of July, 1864, the claimant addressed and transmitted to said Durbin the following letter:

"FORT GIBSON, CHEROKEE NATION.
"*July 23rd*, 1864.

"Capt. GREENE DURBIN,
"*Ass't Quartermaster U. S. Vol's, Fort Smith, Ark's:*

"SIR: I have the honor to acknowledge the receipt of your communication of the 18th inst., ordering me to deliver two thousand tons of hay at the post, Fort Gibson, as provided in the contract of June 20, 1864, and containing a proposition for the delivery of two thousand tons at Cabin Creek, and two thousand tons at Hudson's Crossing of the Neosho River, on the route from Fort Scott, Kansas, to Fort Gibson, C. N., at thirty dollars per ton, and in reply I have to state that I wil' accept your proposition on condition that the necessary military protection be furnished at those points.

"I also enclose you bonds in duplicate for the fulfillment of same as requested.

"Very respectfully, your ob't servant,
"(Signed) "H. E. MCKEE,
"*Hay Contractor.*"

40 IX. In pursuance of the correspondence set forth in the next preceding three findings, and without any advertisement inviting proposals for delivering hay at Cabin Creek and Hudson's Crossing, the contract of the 18th of July, 1864, which is annexed to the petition as Exhibit B, was entered into between said Durbin and the claimant.

X. During the months of July, August, and September, 1864, the Indian brigade were all the troops of the United States that did permanent duty in the Indian Territory, and they were frequently inside fortifications. A great portion of the time other troops were temporarily on duty there. With the troops of his command, General Thayer had to keep open a supply-route between Fort Smith and Fort Scott, a distance of about 250 miles. Upon this route lay Fort Gibson, Cabin Creek, and Hudson's Crossing. Cabin Creek was 55 miles and Hudson's Crossing 85 miles north of Fort Gibson; and the distance from Fort Gibson to Fort Scott was 165 miles.

XI. During those months, along the route between Fort Gibson and Fort Scott, active hostilities existed between the forces of the government and those of the rebellion. Armed forces of the rebels were frequently along the road between those places, and in the vicinity of the hay-stations, with a view of capturing detached parties and attacking supply-trains; and large parties of them appeared frequently in the immediate neighborhood of Fort Gibson; and no working parties were allowed to go out from any of the posts within the District of the Frontier without military protection. Because of this condition of things it was impracticable for General Thayer always to avoid delays in furnishing military protection to parties working under the claimant or under his subcontractors, in making hay under said contracts; but in every case guards and escorts were furnished by him as promptly as the necessities and interests of the public service permitted. The following delays of that description took place: 1. At the commencement of the claimant's work, under the contract of June 20, he was delayed about twenty days for want of military protection. 2. In consequence of the attack made, as hereinafter stated, on the 2d of September, 1864, upon the party of Subcontractor A. Cohen, working under that contract, said Cohen was compelled to suspend work for eight days. 3. One E. C. Amsden, a subcontractor under the claimant for putting up hay at Hudson's Crossing, was two weeks delayed at Fort Gibson from setting out from thence to the crossing, waiting for an escort; and, 4, one George W. Stotts, a subcontractor under the claimant for putting up hay at Cabin Creek, was compelled to wait eight days at Fort Gibson for an escort and guard after he had made application therefor.

XII. The claimant and his subcontractors proceeded to cut and make hay for delivery under the said two contracts, and all the parties employed by the claimant or his subcontractors in that work were at all times provided with escorts and guards in as great strength as the necessities and interests of the public service permitted; but they were not sufficient to resist the attacks which were made upon them by rebel forces, as hereinafter set forth. If a force sufficient to resist those attacks had been provided, the claimant was prepared to furnish all the hay required to fill the said contract.

XIII. The 1,000 tons of hay, which the contract of June 20 required to be delivered at the post of Fort Gibson, were delivered there, and the contract price of $30 per ton was paid therefor by the officers of the Quartermaster's Department. Of the 2,000 tons which that contract required to be put up and delivered in stacks at or within the distance

of seven miles from said post, the claimant delivered there in
41 stacks, and was paid the contract price of $22 per ton for 1,000 tons, by the officers of the Quartermaster's Department.

XIV. Afterwards the claimant presented to the Third Auditor of the Treasury a claim for compensation for hay which had been cut by him for delivery under the said contract of June 20, but not delivered, because destroyed by rebel troops on the 2d of September, 1864; and on the 28th of July, 1869, the Third Auditor recommended the payment of the items of the following account:

"*The United States to Henry E. McKee, Dr.*

Q. M. Dep't.

"For compensation for hay destroyed by rebel enemies, on 2d September, 1864, on the prairie within seven miles from Fort Gibson, C. N.; such hay having been cut by said McKee, for delivery to the United States, in pursuance of a contract made 20th June, 1864, between said McKee and Capt. Green Durbin, assistant quartermaster, viz:	
"400 tons, stacked, at $22 per ton.....	8,800 00
"200 " in process of being stacked, at $19 per ton.....	3,800 00"

The Second Comptroller of the Treasury concurred in the Third Auditor's recommendation; and the said account (being settlement No. 1698) was thereupon paid to the claimant by the Secretary of the Treasury, out of the appropriation for the Quartermaster's Department.

XV. Of the whole quantity of 3,000 tons, deliverable under the contract of June 20, irrespective of the order given by said Durbin in the letter of July 17, set forth in finding VII, and of the 600 tons which were destroyed by the rebels as aforesaid, there remained 400 tons to be delivered; and the claimant was prevented from delivering the same, because, in consequence of the attacks of the rebels upon, and the capture by them of, other parties of hay-makers, twelve miles from Fort Gibson, the post-commander at Fort Gibson ordered in to the post all the parties engaged in cutting and putting up hay to fulfill that contract, and would not permit them to go to work again under that contract.

XVI. Under the contract of July 17, the claimant delivered at Cabin Creek 1,128 tons of hay, for which he was paid the contract price of $30 per ton. On the 19th of September, 1864, at Cabin Creek, an overpowering force of the rebels destroyed 115 tons, which had been cut there for delivery under the contract of July 17; after which no military protection was afforded by the authorities of the United States for parties to cut hay at or near Cabin Creek, and consequently no further work was done by the claimant toward delivering hay at Cabin Creek.

XVII. On the same 19th of September, a subcontractor under the claimant was engaged with a party of hay-makers in cutting hay at Hudson's Crossing, for delivery under the contract of July 17, when information was received there of the attack at Cabin Creek; and Colonel Wheeler, of Thirteenth Kansas Infantry Volunteers, ordered the camp at Hudson's Crossing to be abandoned, and the hay-makers and their guards to fall back on Fort Scott, which was done. At that time the party of the subcontractor had cut 70 tons of hay, which were abandoned when the camp was abandoned; and thereafter no military protection was afforded by the authorities of the United States for parties to cut hay at Hudson's Crossing, and no further work was done there under that contract.

42 XVIII. Afterwards the claimant presented to the Third Auditor of the Treasury a claim for compensation for the 115 tons of hay destroyed by the rebel force at Cabin Creek, and for the 70 tons abandoned at Hudson's Crossing; and the Third Auditor, in pursuance of the decision made by the Second Comptroller, recommended, on the 1st of April, 1870, the allowance and payment of the following account, as settlement No. 3614:

"*The United States to Henry E. McKee, Dr.*

"In addition to an amount of $12,600.00 heretofore awarded him by settlement 1698, made 28th July, 1869, the further sum of..... 6,285 00

"This further sum being awarded him, in pursuance of the decision made 28th March, 1870, by the Second Comptroller, and upon consideration as follows:

"1st. On account of hay which had been cut by said McKee to fill a contract made by him 18th July, 1864, with Capt. Green Durbin, A. Q. M., and which was destroyed by rebel enemies at Cabin Creek (40 miles from Fort Gibson) on 19th Sept., 1864—$3,450.00.

"2d. On account of hay which had been cut by said McKee to fill the said contract, and which was necessarily abandoned and lost at Hudson's Crossing of the Neosho River (70 miles from Fort Gibson) on the 19th of September, 1867—$1,890.00.

"3d. On account of hire of teams used by the United States in said abandonment of the post at Hudson's Crossing—$945.00."

Thereupon, this account was paid to the claimant by the Secretary of the Treasury out of the appropriation for the Quartermaster's Department.

XIX. The claimant furthermore presented to the said Third Auditor a claim for compensation for property destroyed by rebels at Cabin Creek, and near Fort Gibson, while being used by the claimant in preparing hay at those places, and the said Auditor, under the previous decision of the Second Comptroller, recommended, on the 24th of June, 1872, the payment of the following account:

"*The United States to Henry E. McKee, Dr.*

"In addition to the sums heretofore allowed by settlement 1698, of July, 1869, and settlement 3614, of April, 1870, and as compensation for property destroyed by rebels at Cabin Creek, and near Fort Gibson, while being used by said KcKee in preparing hay, under his contract of 20th June, 1864, losses having been occasioned by reason of the failure of the United States to furnish sufficient guards, as stipulated in the contract, allowed on the papers filed in the claim herewith, and in accordance with the accompanying report thereon of the Third Auditor (R. W. Clarke), dated July 15th, 1869, and concurred in by the Second Comptroller, dated June 21st, 1872, amounting to sixteen thousand seven hundred & seventy-four dollars..... $16,774 00

Thereupon, this account was paid to the claimant by the Secretary of the Treasury out of the appropriation for the Quartermaster's Department.

43 XX. On the 26th of September, 1864, the said Durbin addressed the following letter to the claimant:

"OFFICE DEPOT-QUARTERMASTER,
Fort Smith, Ark., Sept. 26, 1864.

"Mr. HENRY E. MCKEE,
"*Fort Gibson, C. N.:*

"Upon the advice of the general commanding, the putting up of hay at Cabin Creek and Hudson's Crossing, Ind. Territ'y, will be immediately stopped. I do not think the best interests of the government will admit of running the risk of protecting forage at those points, as the garrisons are necessarily small.

"You will also immediately stop the further delivery of hay under the contract of the 20th of June, 1864, arranging for the putting up of 2,000 tons within a distance of 7 miles from Fort Gibson, as it is not deemed advisable to complete these contracts any further, except for the delivery of hay at the post of Fort Gibson.

"Respectfully, y'r ob't se'v't,

"GREENE DURBIN,
"*Capt. & A. Q. M.*"

XXI. If the claimant had been enabled to cut and deliver, and had been paid for all the hay called for by the contracts sued on, he would have realized a profit of six dollars per ton upon the 400 remaining to be delivered under the contract of June 20, and a profit of 11 dollars per ton on the 757 tons remaining to be delivered at Cabin Creek, and a like profit on the 1,930 tons remaining to be delivered at Hudson's Crossing.

Additional findings allowed on the request of the defendant:

I. The claimant presented his claim to the Treasury Department for the contract-price of the four hundred tons mentioned in the XIVth finding.

II. For the two hundred tons mentioned in the XIVth finding, he claimed before the Treasury Department nineteen dollars a ton, being the contract-price less the cost of stacking.

III. For the one hundred and fifteen tons mentioned in the XVIth finding, he claimed before the Treasury Department the contract-price.

IV. For the seventy tons mentioned in the XVIth finding, he claimed before the Treasury Department the contract-price less the cost of stacking.

V. These claims were for the value of the hay, as measured by the cost to himself; and he stated in an affidavit accompanying the same, "that the actual cost of putting up the hay was but little, if any, less than the contract-price, and in some cases was not covered by the contract-price; that from the time at which the estimates were made and the contract let to the time at which the material and supplies were purchased gold had advanced from sixty to eighty per cent. premium; that the prices for labor, material, and supplies were regulated by this standard, and actually advanced more than fifty per cent. in the market during the time this work was being done, and your deponent was obliged to pay therefor upon that basis."

VII. The hay thus claimed and paid for had not been delivered to, accepted, or measured by the officers of the United States, and was in the possession and control of the claimant at the time of its destruction.

44 VIII. At the time of the destruction of the six hundred tons mentioned in the XIVth finding, certain animals, machines, and stores belonging to the claimant, and used in the preparation of the hay, were captured and destroyed by the rebels. This property was valued at $1,100, and, upon the allowance of Third Auditor and Second Comptroller, claimant has been paid that sum for it.

IX. At the time of the destruction of the one hundred and fifteen tons mentioned in the XVIth finding, George H. Stotts, a subcontractor under claimant, owned and used, in the preparation of said hay, certain wagons, mules, machines, hay-forks, and also owned certain flour, sugar, corn, &c., all of which was captured or destroyed by the rebels. McKee settled with Stotts for this property at a valuation of $15,674, and has been paid that sum for the same by the Treasury Department.

X. These two sums, $1,100 and $15,674, were allowed on the 21st June, 1872, and were payment for the property mentioned in claimant's petition, filed in this court of December term, 1870, and valued therein at $1,099 and $15,674.

45 And upon the foregoing findings of fact the Court of Claims decides as

Conclusions of law.

I. The claimant is not entitled to recover upon the contract of June 20th, 1864.

II. The claimant is entitled to recover upon the contract of July 17th, 1864, the profits which he would have realized if he had been enabled to perform, to wit, the sum of $29,559.00.

III. The defendants are entitled to recover upon their counter-claim the moneys paid by them to the claimant for hay destroyed under the contract of June 20th, 1864, to wit, the sum of $12,600.00.

IV. The defendants are not entitled to recover upon their counter-claim for moneys paid by them to the claimant for hay and property destroyed under the contract of July 17th, 1864.

By the court.

46 IX.—*Opinion of the court.*

NOTT, J., delivered the following opinion:

This case contains four causes of action, two of which are presented by the claimant and two by the defendants. The facts briefly stated, are these:

In 1864 the claimant and a quartermaster entered into two contracts, the terms of which, however, are substantially identical. The claimant covenanted to furnish large quantities of hay at certain designated points in the Indian Territory; the defendants covenanted as follows: "It is expressly understood by the contracting parties that sufficient guards and escorts shall be furnished by the government to protect the contractor while engaged in the fulfillment of this contract." The claimant delivered a portion of the hay contracted for, and it has been paid for and is not an element in the present controversy. As to the remainder, he was stopped in the midst of performance, in part by the acts of the public enemy, in part by the orders of the post commander at Fort Gibson, but in all cases for the want of "sufficient guards and escorts." The accounting officers of the Treasury treated the covenants above quoted as covenants of indemnity, and adjusted and settled the

claimant's accounts for losses actually suffered, and the claimant accepted and acquiesced in the settlement. The subject of profits was not considered in the settlement, for the reason that such unliquidated damages are never adjusted at the Treasury. The claimant now brings his action to recover them exclusively; the defendants deny the validity of the contracts and file their counter-claims to recover back the allowances made by the accounting-officers as moneys paid in mistake of law.

I. The claimant's first cause of action is founded on a contract made in June, 1864, which was founded on a quartermaster's advertisement for proposals. This advertisement called for the delivery of 3,000 tons of hay at Fort Gibson, and promised the contractor "such military protection" "as the necessities and interests of the service may admit." The contract departed from its terms in dividing the quantity of 3,000 tons into two parcels, one to be delivered at Fort Gibson at $30 per ton, the other seven miles distant at $22; and in covenanting to furnish "sufficient guards and escorts" "to protect the contractor while engaged in the fulfillment of this contract." Because of these discrepancies, it is insisted by the defendants that the contract was void, and that no action can be maintained upon their breach.

As to the first discrepancy, the act 2d March, 1861 (Stat. L., p. § 10), though it requires a contracting officer to advertise, still leaves with him a very large discretion. The time is not prescribed, nor the form, nor the substance of the advertisement; nor is the officer even restricted to accepting the lowest bid. In this the statute differs from other advertisement acts, and notably from the post-office act, which recently received a liberal construction from the Supreme Court. (Garfielde's case, 11 C. Cls. R., 322.) Dividing the hay into two parcels, deliverable at different places at different prices, was a variation, in the judgment of the contracting-officer, for the benefit of the government, and fairly within his discretion. Such discretion has been exercised by officers of the Quartermaster Department ever since the first advertisement
47 act was passed. The distinguished officer who has long presided over that department, and guided its administration with an inflexible and frugal hand, in his well-known communication to General Blair, August 28, 1861, relating to the affairs of General Frémont's department, said—and it was not questioned then and has never been questioned since:

"Whatever a general commanding orders, the subordinates of his staff are, by regulations, compelled to do, if possible." "In regard to advertisement and delivery, the law of 1861 and the regulations expressly provide that in case of public exigencies supplies are to be bought in open market as between individuals. Exercise this power. Moreover, advertisements or public notice does not require postponing opening of bids for a month, or a week, or two days. If forage, wagons, horses are wanted, the law, the necessity, are fully met by putting a notice in the papers and purchasing as fast as offers come in. The next day or the same day take the then lowest bid or the then most advantageous offer. The day after you will have a still better offer; take that for a portion of your supplies, and so on till you have all you need."

The second discrepancy between the advertisement and the contract, or, rather, between the proposals and the contract, forms the foundation and subject of this cause of action. What the claimant sues upon was not offered by the advertisement nor stipulated for by the proposals, but was a subsequent obligation thrust into the formal contract. The thing to be furnished by the contractor remained the same; the price to be

paid by the government remained the same; and then, in addition to the bargain made by the advertisement and proposals, the quartermaster gratuitously gave to the claimant a guarantee or covenant of insurance against war-risks, upon which, exclusively, his present demand is founded. As this insurance was not promised by the advertisement, nor required by the proposals, nor given in exchange for anything which had been the subject of negotiation, it seems to us to be an obligation beyond the officer's discretion, and evasive of that competition which the statute was intended to secure. If the thing promised by the advertisement had been indefinite, it would have been proper to render it certain in the contract; but here the advertisement bound the government to do substantially nothing, and left the war-risks of the undertaking entirely with the contractor, while the obligation added to the contract bound the government to furnish all needful protection, and transferred to it the risk which constitutes the present cause of action. It is not to be understood that this addition voided the entire contract; it is only this obligation of the defendants that is without legal foundation. The covenants of the claimant, and the consideration which supports them, remain intact.

II. The claimant's second cause of action rests upon a contract made without advertisement the 17th July, 1864.

It is objected by the defendants that the order of the commanding officer which gave rise to this contract did not declare an emergency, as was required by the act 4th July, 1864 (13 Stat. L., p. 394, § 4). The construction which I think should be given to that statute I have heretofore expressed in Thompson's case (9 C. Cls. R., 187–196), and subsequent reflection confirms the conclusions which were there reached. They may be summed up in the following rule: Where a statute expressly defines the powers of an officer or agent, it is notice to all the world; but where a statute confides a discretion to an officer, a party dealing with him in good faith may assume that the discretion is properly exercised; and if the discretion is vested in a superior
48 officer, while the transaction is with his subordinate, the contractor may assume in like manner that the discretion has been properly exercised, and that the subordinate is acting in accordance with his superior's orders and carrying out the exercise of his superior's discretion.

Conceding, however, for the purposes of this decision, that a contractor dealing with a quartermaster during the existence of the act of 1864 was chargeable with knowledge of all the orders by which a commanding officer might seek to provide for military emergencies in the midst of a great war, I am nevertheless of the opinion that in this instance the order sustains the contract.

The statute was passed exclusively for the late war, and was intended to impose upon the discretion vested by law in unnumbered inexperienced assistant and acting assistant quartermasters the discretion of their commanding officer. It did not prescribe formalities. Its purpose was to secure the judgment of a commanding officer as a basis for the action of a quartermaster. In this instance the commanding officer's judgment was clearly the basis and the only basis of the quartermaster's action. If the order had never been issued, no contract would have ever been made. The order in fact related to two distinct things; it declared an emergency, and directed how the quartermaster should proceed to provide for it. The direction, "should there not be time to advertise and regularly let the contract, you will make the arrangements for the delivery of the hay on the best terms you can," did not

confer discretion to judge whether there was or was not an emergency which would or would not require the designated quantity of hay. It only designated the ways and means by which the quartermaster was to proceed in his part of the work, and to that extent, indeed, limited and lessened the discretion which he might otherwise have exercised.

The fallacy of the defendants' argument is in this: that it supposes that a commanding officer must not only declare an emergency, but must also decide that the supplies on hand are insufficient to meet it, and that the procurement of others must be by immediate purchase. I apprehend, on the contrary, that a commanding officer is not chargeable with these responsibilities, which properly belong to his quartermasters. If he should say to his chief quartermaster, "This army will begin a retreat in thirty days; have then sufficient teams ready for the movement," he would have determined all that the law required him to decide. The quartermaster should then ascertain the number of teams which would be required, the number on hand, the deficiency to be provided for, the proportion thereof that could be procured by advertisement, and the balance that must be bought in the market. In the administrative details of providing for the emergency after it had been declared he was by law invested with all necessary discretion, and those details properly belonged to him and not to his commanding officer. Thus the order of the commanding general in this case merely enjoined the quartermaster to do precisely what it would have been his duty to do without the order, and left nothing to his discretion which the law had not already placed there.

It is also objected that the quartermaster did not proceed in the proper way to meet the emergency, if one was indeed declared. But it is manifest that if the quartermaster was authorized by law to act, this court cannot review the manner in which he acted. Undoubtedly judges upon the bench would make a contract with more deliberation, wisdom, and solemnity than quartermasters in the midst of hostilities; but the statute was made for ordinary men, little learned in the law, and laden with the severest responsibilities that ever tax or distract the mind.

49 It is enough here for us to know that the contracting quartermaster thought this the most immediate method possible for the procurement of the supplies; and it does not rest with courts of law to find a better method after the transaction.

In like manner it is objected that, upon the face of the order and contract, the contractor was chargeable with knowledge that no emergency in fact existed, and that an agreement made in July to furnish hay through August and September could not possibly be the means for providing for a military emergency. But the emergency contemplated by the statute is not restricted to a march or a battle on the day when the order is given. In this case, when the commanding officer discovered that he would need a large quantity of hay during the ensuing winter in a remote situation where it could not be bought; that the haying season was already far advanced; that implements and hands had to be brought a great distance before the work could begin, he decided, as it was his duty to do, that he had a very serious emergency to provide for; and it was not a time when a prudent person would have wasted a week or a day in the solemn trifling of advertising for proposals in a region beyond the boundaries of civilization.

This cause of action then depends upon the effect which should be given to the covenant promising sufficient guards and escorts; and it may be best understood in the light of the circumstances amid which

the contract was made, and the contemporaneous construction which the parties mutually gave to their agreement.

The circumstances were, that the contract was made in the midst of war, and was to be fulfilled on the scene of actual hostilities. The contemporary construction was, on the part of the post commander, that he recognized the risk which had been assumed for the government, and forbade the working parties of the contractor going out to make hay without the sufficient escort which it had been agreed should be furnished, but which he deemed it inexpedient to send; on the part of the contractor, that he recognized the right of the commanding officer to control his performance in this particular, and obeyed his commands.

The counsel for the defendants has argued that this covenant was a mere agreement by a military officer to protect a citizen in the performance of his own business; that it was gratuitous, beyond the powers of military officers, and void. Undoubtedly such an agreement to protect a citizen in the pursuit of his ordinary avocations would be void. But here the covenant in question manifestly was given for a very different purpose.

The contract was in form a contract of sale and delivery, but in substance a contract for work and service. When I employ a man to go upon my land and cut and deliver my hay at so much per ton, the property remains in me, whatever be the form of the agreement, and what I pay him for is not for his property in the hay, but for the labor which he has expended upon it. Here the hay indisputably was to be cut upon the public domain, and the property in it was and remained in the defendants. But the point need not be discussed, for it was considered in Spencer's Case (10 C. Cl's R., 255), and expressly so decided.

The purpose of the covenant, then, was not to protect a citizen generally in his business, but to protect a contractor in specific work and service which he had agreed to perform for the government; that is to say, in the fulfillment of a specific obligation into which he had entered at the request of the government, and from the fulfillment of which the government expected to reap an advantage. If the defendants, officers had arbitrarily refused to furnish a guard, clearly the contractor would have been relieved from his obligation to perform. Porter's Case (9 C. Cls. R., 356). Can it then be held that the covenant was not a moving consideration for the contract, without which the contractor would not have entered into it, or that it is not as obligatory upon the defendants as any obligation which he had assumed on the faith of it? As was said by the learned counsel who represented the claimant on the first trial of this case,* "There was a war-risk to be run, and the question when they made the contract was, which party should bear it." The contract, recognizing the risk, answered that it should be upon the defendants; and the obligation thus assumed was analogous to those numberless charter-parties made during the war, where the government agreed to assume the war-risks of the vessels which it chartered, though manned and navigated by the owners—agreements the validity of which has never been questioned in the Supreme Court, nor in this.

If this covenant had been simply to furnish a guard, and the commanding officer had furnished one which proved insufficient, it might be held that the defendants had complied with their covenant, and that the risk remained with the contractor. But here they covenanted to do two things: first, to furnish "guards and escorts;" second, that those

* Mr. E. P. Norton, now deceased.

guards and escorts should be "sufficient" to secure "the fulfillment of this contract." The agreement, moreover, was construed by the officer who made it as a covenant of indemnity, which would render the defendants liable for all of the contractor's losses caused by the public enemy; and to lessen that indemnity as much as possible, the commanding officer interfered positively by forbidding the contractor to proceed with the fulfillment which the defendants had covenanted to protect. That an indemnity against losses may be given to a contractor by the agents of the government was established by the Supreme Court in Baird's Case (8 C. Cls. R., 13).

III. The defendants' first counter-claim is to recover back certain payments allowed by the Second Comptroller of the Treasury upon the insurance-clause in the first contract, before referred to; that is to say, the Comptroller deemed the covenant valid which this court now decides to have been invalid, and the counter-claim is to recover back the money paid on his adjustment. It is conceded that the payment was not procured by fraud, nor made in mistake of fact, and that it could not be recovered back by any other party than the government, and by it only on the ground that its agents are not its agents when they make payments which are not authorized by law. The recent case of McElrath is regarded as decisive authority upon the point.

Between this case and McElrath's, however, there is a very broad difference. The Second Comptroller was the agent of the United States to adjust and settle the accounts of officers in the Navy. McElrath was not an officer in the Navy, nor had he been for any part of the period over which his pretended account extended; nor had he rendered any service as such; nor had any legal relations between him and the government existed. The Second Comptroller, therefore, acted ab initio without authority; and his mistake, whether of law or of fact, that he had jurisdiction of the pretended account, gave him none. If in the adjustment of an account which he was authorized to adjust—the account of a veritable officer in the Navy—he had made an incidental mistake of law in allowing to the officer some item of pay which in the judgment of the courts should have been disallowed, and the de-
51 fendants had brought their cross-action to recover back the overpayment, the case would have been like this.

That settlements made by the accounting officers of the government with its creditors, untainted by fraud, and free from mistake of fact, possess the element of finality, I think is clear for many reasons.

1. The Comptrollers of the Treasury are neither contracting nor disbursing officers. Within the proper functions of these officers they are above the review of the highest executive authority, and their decisions are subject to only judicial revision. Substantially all accounts must pass under their eye and receive their approval. Even the accounts of the Secretary of the Treasury and of the President come to them for allowance. In the case of disbursing-officers the policy of the government has been to acknowledge no payments as made on its behalf save those which were authorized by law. If an officer makes a mistake of law the payment is disallowed when his accounts come in for settlement, and charged to him as if the money were still in his hands. But the business of the Comptrollers is to determine what payments shall or shall not be made on behalf of the United States. These functions of office were a part of the wondrous birth of the Treasury system, and have remained unchanged from the foundation of the government to the present time. The only statute which has been passed since the First Comptroller's office was established is declaratory and mandatory as to their powers. Act 30th March, (15 Stat. L., p. 54.)

2. If the Comptrollers' settlements have not the ordinary element of finality; if those officers are not the agents of the government to make final settlements with its creditors, the government has had the power and the means to take advantage of their errors of law for the last eighty years by going into any court as plaintiff and suing the party to whom money was paid in mistake of law. Yet, from the first day that the Treasury did business until this counter-claim was set up, it is safe to say that no such suit was ever brought, and that no man ever supposed that such an action would lie. A practical construction, going back to the very beginning of the government, is overwhelming, and cannot be overturned at this late day with safety, by anything short of statutory amendment.

3. As no statute of limitations closes inquiry into the past transactions of the government, all of the settlements which present and past Comptrollers have ever made will be liable to be re-opened. It is well known that the Comptrollers have sometimes construed statutes in one way, and the courts subsequently in another. Such diversity of judgment is inevitable in the administration of human affairs, and the wonder is that there has been so little of it on the part of these officers. The act 3d March, 1849, (9 Stat. L., p. 415, § 2,) will furnish one of many illustrations. The Treasury always held that this act extended to vessels in the military service, though navigated by their owners, (Reed's Case, 4 C. Cls. R., 132;) the Supreme Court has recently held the contrary, (Shaw's Case, .) Can it be possible that all such past transactions are now liable to be re-opened; that nothing has ever been settled; that no payment ever made is to be considered final? Such a ruling cannot promote the public welfare, and, in my judgment, would be prolific in public mischiefs.

4. It is manifest that so broad a rule as is contended for by the defendants would be holding in effect that the accounting officers of the Treasury are the agents of the government so long as their mistakes of law are favorable to their principal, but that their agency ceases eo instanti whenever they err incidentally against the government in the
52 difficult task of construing the statutes of the United States. The result of such a rule would often be that as to one-half of a settlement the accounting-officers would be agents and the settlement final; that as to the other half it would be binding upon the creditor if he took the money, but not upon the debtor, and that practically mutuality and finality would be stripped from all Treasury adjustments.

It is not possible, I think, that such a rule can ever be upheld. Certainly the courts have been open to the Government ever since courts were established, and it has never been supposed that such an action could be maintained. The real question here, I apprehend, is one of agency and not of mistake. When the accounting-officers are authorized by law to adjust an account or settle a claim, the principles of law that would govern the settlements of individuals will govern theirs. The true rule to be laid down, I think, is this: Where the accounting-officers of the Treasury are authorized to settle an account or claim against the Government, a mistake of law committed incidentally in the adjustment will not, after payment of the balance found to be due, affect the finality of the settlement nor entitle the Government to recover back the money paid in mistake of law ex equo et bono.

IV. The second counter-claim of the defendants is to recover back the money awarded upon the indemnity clause in the second contract, which a majority of the court now hold to have been valid. The only point made which has not been considered is, that a part of the amount

awarded by the Comptroller was for hay of the claimants destroyed by the public enemy, and that the accounting-officers have not jurisdiction of such damages.

To this objection there are three sufficient answers. 1st. The hay destroyed was not the property of the claimant, but, on the contrary, the property in the hay was always in the defendants, and the contract to furnish hay cut from the public domain was a contract for work and service, as was determined in Spencer's Case (10 C. Cls. R., 255). 2d. The accounting-officers correctly ascribed that effect to the contract, and their award was not for hay destroyed, but for work and services expended by the claimant on that hay of the government which was destroyed. 3d. The award was based upon the indemnity clause of the contract, and the loss of the claimant upon this hay was because of the defendants' breach of that covenant, and the form which the award took was merely for the convenient ascertainment of the damages suffered.

The conclusions which a majority of the court are agreed upon are these:

1. The claimant is not entitled to recover upon the contract of June 20, 1864.

2. The claimant is entitled to recover upon the contract of July 17, 1864, the profits which he would have realized if he had been enabled to perform, to wit, the sum of $29,557.

3. The defendants are entitled to recover upon their counter-claim the moneys paid by them to the claimant for hay destroyed, under the contract of June 20, 1864, to wit, the sum of $12,600.

4. The defendants are not entitled to recover upon their counter-claim for moneys paid by them to the claimant for hay and property destroyed under the contract of July 17, 1864.

The judgment of the court is, that the claimant recover of the defendants the sum of $16,957.

LORING, J., agreed in all of the conclusions reached by the majority of the court.

53 PECK, J., agreed in the opinion read by NOTT, J., except that he was of the opinion that the claimant should recover upon the contract of June 20, 1864, and that the covenant of military protection thereby assured to the claimant was valid and binding upon the defendants.

DRAKE, Ch. J., dissenting:

I dissent from so much of the opinion of the majority of the court as relates to the contract of July 18, and the counter-claim growing out of it. In my judgment, the claimant has no cause of action under that contract, and the defendants have a just right in law to recover back money illegally allowed and paid him on claims connected with its performance.

I will briefly recall the circumstances under which that contract was entered into, as set forth in the finding of facts. In the summer of 1864, the troops under Brigadier-General Thayer's command, in the Indian Territory south of Kansas and west of Arkansas, were cut off from any base of supply of grain, and were compelled to rely solely upon grass and hay for the support of their animals. Grass was very abundant there, and hay could have been put up as late as the last of October. Owing to this condition of things, and as well to provide hay for present use as for the ensuing fall and winter for the posts in General Thayer's command, the contracts sued on were entered into; that of June 20 for the supply of Fort Gibson, and that of July 18 for the supply of Cabin Creek and Hudson's Crossing. The former was entered into after the

quartermaster had advertised for proposals; the latter without any advertisement.

As to the latter, two questions arise: 1. Whether the quartermaster had lawful authority to make a contract without advertisement; and, 2. If he had, whether he had lawful authority to bind the Government to furnish military protection to the claimant, in the terms contained in the contract.

The determination of the first question involves the consideration of two acts of Congress, viz, the tenth section of the act of March 2, 1861 (12 Stat. L., 220), and the fourth section of the act of July 4, 1864 (13 Stat. L., 394).

The former is in these words: "That all purchases and contracts for supplies or services in any of the departments of the government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals."

If this statute is to be considered applicable to the case, then we are to receive two points in regard to it as settled by the Supreme Court in Speed's Case (8 Wallace, 77), viz: 1. That while, as a general rule, it requires an advertisement, still it invests the officer charged with the duty of procuring supplies with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery; and, 2. That where a discretion of this kind is conferred on an officer, and a contract is made in which he has exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may accompany its exercise.

It will be observed that the contract in that case was for work
54 to be done by the claimant in slaughtering and packing hogs furnished to him by the government for that purpose, and it was entered into by the authority of the Secretary of War; while in this case the contract was for the delivery of stacked hay, and was entered into by an assistant quartermaster. In the former case work was to be paid for as work; in the latter, no work was to be paid for as such, but the hay was to be paid for at a certain rate "for each and every ton delivered and accepted." The question, therefore, of contracting for work is not in this case, but simply one of delivering a given quantity of hay.

I do not deny that the quartermaster, if this statute applies, had a discretion to dispense with an advertisement, if the public exigencies required the "immediate" delivery of the hay. What does "immediate" mean there? In ordinary parlance it means, "not deferred by an interval of time; present; instant" (Webster); but clearly that is not its imperative meaning in this statute; for it would in many cases be a physicial impossibility to comply with it. Neither the claimant nor any other man or body of men could have made immediate delivery of 4,000 tons of hay, half at a point 55 miles and half at a point 85 miles from the place where the contract was made. "Immediate," then, must be construed with reference to the particular facts of each case arising under the act. If the supply needed in an exigency can be purchased and obtained on the instant, the quartermaster has no right to contract for its delivery at a future period. If, however, as in this case, instant de-

livery be impossible, then, as I take it, the contract, to be justified by the statute, must be for a delivery at the earliest time practicable under the circumstances, upon the assumption that the contractor will immediately set about obtaining and furnishing the article, and that it will be furnished as soon as it can be in the steady exercise of due diligence on his part, from the date of the contract until delivery. In such case the element of first importance, and in my judgment indispensable, to create liability on the part of the government, is the immediate commencement of suitable effort to fulfill the contract. The statute authorizes a contract without advertisement only when "immediate delivery is required by the public exigency"; that is, by a state of urgent or exacting want demanding immediate supply; and the existence of such exigency utterly forbids the idea of a contract for delivery at a distant day; or rather forbids the idea that a contract for delivery at a distant day could have been dictated by an exigency requiring immediate delivery. And this view was unanimously held by this court in McKinney's case (4 Ct. Cls. R., 536), where damages were claimed for breach of a contract for wood, made on the authority of the chief quartermaster of the Army of the Cumberland, in the midst of a pressing exigency for that article, but calling for its delivery at a future time. The court said: "The evidence shows that an exigency for wood existed when the contract was made, but the contract shows that it was not made to meet that exigency, for it was made on the 1st of December, 1864, for the delivery of wood from the 1st of March to the 1st of May, 1865." That, in my judgment, is the true view, and should be applied to this case, where the contract was made on the 18th of July for a delivery to commence by the 10th of August, and to be completed by the 25th of September—23 days to start, and 46 more to keep on, making 69 days allowed for effecting an immediate delivery required by a public exigency. The mere statement of such a case seems to me to display its weakness. I can see no possible justification of the quartermaster's action. In my judgment he either did not know his duty, or will-
55 fully disregarded it. In either view his contract was void, and cannot under the act of March 2, 1861, serve as a foundation for this action.

If it be supposed that the tenth section of the act of July 4, 1864, authorized such a proceeding on his part, there is a twofold answer: 1, That the claimant's counsel earnestly objected to that statute being considered to have any bearing on the case; and, 2, that, in fact, it furnishes no authority for the quartermaster's action; as I will endeavor to show.

That section is in these words: "When an emergency shall exist, requiring the immediate procurement of supplies for the necessary movements and operations of any army or detachment, and when such supplies cannot be procured from any established depot of the Quartermaster's Department, or from the head of the division charged with the duty of furnishing such supplies, within the required time, then it shall be lawful for the commanding officer of such army or detachment to order the chief quartermaster of such army or detachment to procure such supplies during the continuance of such emergency, but no longer, in the most expeditious manner, and without advertisement; and it shall be the duty of such quartermaster to obey such order, and his accounts of the disbursements of moneys for such supplies shall be accompanied by the order of the commanding officer as aforesaid, or a certified copy of the same, and also by a statement of the particular facts and circumstances, with their dates, constituting such emergency."

Now, what was necessary to authorize a commanding officer of an army or detachment to exercise the large authority conferred by this section? Three things were required, namely: 1. The existence of an emergency requiring the immediate procurement of supplies; 2. That the emergency should require that immediate procurement for the necessary movements and operations of his army or detachment; and, 3. That the needed supplies could not, within the required time, be procured from any established depot of the Quartermaster's Department, or from the head of a division charged with the duty of furnishing the same.

Those are the circumstances constituting an emergency authorizing the commanding officer to avail himself of the summary power conferred by that section. In reference to the exercise of that power, the following points, except the sixth, have been decided by the unanimous judgments of this court, none of which were appealed from:

1. That to the commanding officer of the army or detachment is left the question of the existence of the emergency authorizing the immediate procurement of supplies, without advertisement. (Henderson's case, 4 C. Cls. R., 75.)

2. That he is the sole judge of the existence of the emergency. (Baker & Folsom's case, 3 C. Cls. R., 343; Emery & Blake's case, 4 ibid., 401; Wilcox's case, 5 ibid., 386.)

3. That his orders in the premises are, as to the existence of the emergency, conclusive upon the officers charged with obtaining the supplies. (Henderson's case.)

4. That without his authority a quartermaster would have no lawful authority to contract, without advertisement, for future supplies. (Henderson's case and Emery & Blake's case.)

5. That the commanding officer's authority to give an order for the immediate procurement of supplies, without advertisement, continues only so long as the emergency exists. (Emery & Blake's case.)

6. That the order of the commanding officer in such emergency
56 must be to procure the supplies in the most expeditious manner and without advertisement.

7. That under such an order a contract could not be made extending beyond the period of the existence of the emergency. (Emery & Blake's Case.)

8. That he who contracts with a quartermaster for the delivery of supplies, without advertisement, is bound to know whether the proper commanding officer has declared the emergency, and authorized the officer making the contract to dispense with the advertisement. (Henderson's Case.)

Applying these rulings to the present case, let us see how the matter stands.

In the first place, let it be noted that the question is not whether this court is bound to infer, or may infer, from General Thayer's order of July 17, that an emergency existed requiring the "immediate procurement" of 2,000 tons of hay at Cabin Creek, and 2,000 tons at Hudson's Crossing. If General Thayer had—as General Thomas was shown in Cobb, Christy & Co.'s Case to have done (7 C. Cls. R., 470)—ordered the procurement of the supply "in the most expeditious manner, at all events," I am free to admit that his giving such an order would go far toward proving the existence of the emergency described in the statute, and, supported by other proof to the same end, as was done in that case, would justify this court in finding that, in fact, the emergency existed. But if I am capable of comprehending the meaning of lan-

guage, General Thayer's order not only did not declare the existence of an emergency, but did not direct the quartermaster to procure the hay "in the most expeditious manner, without advertisement," nor even require its "immediate procurement," and left it to the quartermaster to decide whether there was "time to advertise and regularly let the contract," a thing which General Thayer alone had the lawful power to decide, and being a matter of judgment committed by the law to him, he had no lawful right to delegate to a subordinate officer. Here is the order:

"HEADQUARTERS DISTRICT OF THE FRONTIER,
Fort Smith, Ark., July 17, 1864.

"The general commanding directs that you immediately take the necessary steps for the delivery of four thousand tons of hay at Cabin Creek, 40 miles from Fort Gibson, & at Hudson's Crossing of the Neosho River, 70 miles from the fort; two thousand tons to be delivered at each of said points. Should there not be time to advertise & regularly let the contract, you will make the arrangements for the delivery of the hay on the best terms you can, but not to exceed the contract-rates for the delivery of hay at Fort Gibson, C. N., under the existing contract.

"Very respectfully, &c.,
(Signed) "T. J. ANDERSON,
"*Major & A. A. Gen'l.*

"Capt. GREENE DURBIN,
"*Chief Quartermaster.*"

There is not a word there about procuring hay "in the most expeditious manner without advertisement," nor about its "immediate procurement," but simply a direction to the quartermaster that he "immediately take the necessary steps for the delivery of 4,000 tons of hay at Cabin Creek and Hudson's Crossing," without any direction or intimation of a time of delivery. There is a very wide difference be-
57 tween the two things. The first contemplates immediate action, for an immediate result; the second, immediate action for a future result. And beyond doubt, to my mind, the latter was what General Thayer meant; for in the closing sentence of the order he says: "Should there not be time to advertise and regularly let the contract, you will make arrangements for the delivery of the hay"—not, be it observed, "in the most expeditious manner," but—"on the best terms you can;" and to show that "best terms" had no reference to time, but only to cost, he adds, "but not to exceed the contract-rates for the delivery of hay at Fort Gibson under the existing contract." And this interpretation of the order is in clear consonance with General Thayer's approval, the next day, of the contract entered into between the quartermaster and the claimant, for a delivery to begin by August 10, and be completed by September 25.

If, then, General Thayer gave no order either for the procurement of the hay "in the most expeditious manner without advertisement," or for its "immediate procurement," there is no semblance of the existence of an emergency requiring its being so procured, much less any proof of it; and if there was no such emergency either declared by General Thayer or fairly inferable from his order, then the quartermaster had no legal authority to enter into the contract without advertisement, and i is therefore wholly void.

But if I am wrong in these views, and if the authority of the quarter-

master to make a contract, under the circumstances, for a future supply of hay, without advertisement, ought to be sustained, still the great question of the case, and one I believe not before presented for judicial decision, is to be met and answered.

The claimant sues to recover the profit he would have made on the hay he agreed to deliver at Cabin Creek and Hudson's Crossing, and which he was prevented from delivering by the failure of the military authorities to furnish him sufficient guards and escorts for his protection while engaged in fulfilling the contract; and the question is, whether the quartermaster, with or without the approval of General Thayer, had lawful authority to bind the United States, as was attempted to be done by the insertion in the contract of these words: "It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractor while engaged in the fulfillment of this contract."

To form a just estimate of the extraordinary character of this stipulation, let us glance at the circumstances found by the court to have existed in the district of the frontier when this contract was made, and during the time it was to be executed. Along the route of 250 miles from Fort Gibson to Fort Scott active hostilities existed between the forces of the United States and those of the rebellion. Armed forces of the rebels were frequently along the road between those places and in the vicinity of hay-stations, with a view of capturing detached parties and attacking supply-trains, and large parties of them appeared frequently in the immediate neighborhood of Fort Gibson; so that no working parties were allowed to go out from any of the posts within that district without military protection. With the troops of his command, General Thayer had to keep open that whole route of 250 miles and afford that protection, besides meeting such other demands as the state of active hostilities there presented. To do all this, he had one Indian brigade as a permanent force, and they were frequently inside fortifications. Sometimes other troops were temporarily on duty in his district.

Under such circumstances, if the quartermaster had agreed to
58 furnish the claimant such guards and escorts as the necessities and interests of the service might permit, the case would have been very different; but he attempts to bind, not himself alone, nor General Thayer alone, but the Government of the United States, not contingently, but absolutely, always and everywhere, during the time covered by the contract, to provide sufficient guards and escorts to protect this contractor against all hostile comers, whether a small band of marauding guer'illas or a disciplined army requiring a hundred brigades to repel it. At the instant of signing the contract it was as good as broken; for the probabilities were as twenty to one that before its completion the contractor would suffer just what occurred. The stipulation, if binding, made the government an absolute insurer of the contractor against all the contingencies, casualties, and risks of the enormous war that then shook the land, and against all the damage that might come to him from the enemy.

The mind instantly asks for the law which authorized an assistant quartermaster to bind his government in such an unprecedented obligation, and it asks in vain; for there was no such law. If that quartermaster could have legally made such a contract, of course every other quartermaster in the Army could have done the same. If quartermasters and district commanders could so bargain away the troops for the protection of contractors, then the troops would be not in the service of

the government, but of the contractors. No military officer of any rank, in line or staff, ever had, or ever will have, in this country, such authority. The military forces of the nation cannot, either in peace or war, be so bound to the service of an individual. They are not the subject of such contract, but are absolutely out of the range of all contracts, except that which binds each soldier to his duty. Their commander may order them wherever in his district it may, in his judgment, be necessary, but he cannot turn them over by contract to any man.

It was urged that this quartermaster did no more in this matter than other quartermasters did, all through the war, in chartering vessels and agreeing that the government should bear certain risks while the charter lasted, and that contracts of that kind have been judicially upheld. But the cases are not alike, for in no instance that has yet appeared was there a stipulation binding the government to furnish sufficient guards and escorts to protect the chartered vessel against the enemy while she was in the service of the United States. The nearest to it that has come under my notice was the chartering of a vessel and stipulating that the government should bear all risks; and yet, when properly regarded, there is no real likeness between that case and this.

When the government, in time of war, needs vessels for its transport-service, there are three ways of getting them—by purchase, by impressment, or by hiring.

If it purchases, it of course assumes all risks while its ownership lasts.

If it impresses, it assumes all risks while the impressment lasts.

If it hires the entire vessel, with the possession, command, and control of navigation wholly vested in and held and exercised by the government, then the government is, in law, considered the owner for the voyage or service stipulated. (Leary vs. United States, 14 Wallace, 607.) In such case the government assumes all risks, unless the owner consent to bear part of them. When, therefore, in the case of such hiring as that, a quartermaster stipulates either that the government shall bear the war-risk or that it shall bear all risks, he thereby imposes no liability upon the government, for he only expresses on paper an ob-
59 ligation which the law itself imposes, through the mere fact of a hiring which devests the owner of all possession and control, and transfers all possession and control to the government.

If it hires a vessel which, though officered, manned, and managed by her owner, is placed under the orders of the government, is to go wherever ordered, and nowhere without orders, and it is stipulated that the government shall bear the war-risk, or even all risks, the utmost limit of resulting liability upon the government would be the value of the vessel, if she should be lost by such risk while obeying orders; and it may well be questioned whether the government would not, without such stipulation, be bound, in case of such loss, to pay that value. But whether so or not, that case is unlike this; because here the contract bound the government to follow a man, not under its orders, with sufficient guards and escorts to protect him while engaged in fulfilling the contract, whenever and wherever he might, ex mero motu, see fit to go to procure the hay he was to deliver; and if, in spite of all the efforts the military authorities could make to protect him, he should be prevented by an overpowering force of the enemy from fulfilling the contract, then that the government should be bound to an undefined and unlimited extent to pay him all damages he should thereby suffer. In one case the agreement was to bear the loss of a thing which the government had always, so to speak, in its own hands; in the other, to bear the

damage which a contractor might suffer, whose movements were always to be his own, and not at any time to be made under the government's orders or subject to its control. The two cases seem to me to be essentially different.

My opinion, then, is that when this quartermaster assumed to bind the government to do what the mere fact of making a contract for the delivery of the hay did not in law entitle the claimant to have done for him, that is, to furnish him with unlimited and always effective guards and escorts wherever and whenever, during the stipulated time he might be engaged in fulfilling the contract, regardless of all other demands and exigencies of surrounding war, he undertook to do what he had no authority for doing, whether with or without the orders or the approval of the commander of the district; and his stipulation to that end was wholly void, even if the remainder of the contract be held valid.

But it is suggested that, as the hay was cut from the public domain, it belonged to the government, and, therefore, when the quartermaster agreed to furnish sufficient guards and escorts, it was in reality for the protection of the property of the United States. Unfortunately, however, for this view, the land was only in a limited sense a part of the public domain. The title to the soil was in the United States, but the government had long ago, by treaties which are still in force, ceded and guaranteed the possession, use, and occupation thereof to the Cherokee Nation of Indians. Therefore the produce of the soil did not belong to the government, but to that nation. Still further, unfortunately, if the hay belonged to the United States, then there was no legal right in the claimant to be paid at the Treasury for what was destroyed by the rebels, nor is there any right in him now to recover here for what he was prevented, by the want of sufficient guards and escorts, from delivering under the contract.

But there is another and very grave question remaining to be considered. The claimant succeeded in obtaining the allowance by the accounting-officers of the Treasury, and the payment out of the Treasury of $5,340 for hay which he had caused to be cut under this contract, and which, before its delivery to the military authorities, was destroyed by rebel enemies at Cabin Creek and Hudson's Crossing; and also $16,774, as compensation for property destroyed there by the same enemies; both of which losses those accounting-officers found to have been "occasioned by the failure of the United States to furnish sufficient guards, as stipulated in the contract." The government seeks to recover back those sums by way of counter-claim in this suit. This brings up the question of the legality of those allowances.

If the agreement for sufficient guards and escorts be held invalid, the allowances were clearly unlawful. But assuming it to have been valid and binding upon the United States, were those allowances such as the accounting-officers had lawful authority to make? I think not, for the following reasons:

1. The allowances were adjudications of unliquidated damages in favor of the claimant; and, in my opinion, they had no jurisdiction to make any such adjudication. This court is the tribunal to which the government has consented to refer such matters. But as Judge Richardson's opinion, next to be read, covers this point, and I concur in it, I will not enlarge in this direction.

2. Supposing those officers to have had the authority to allow unliquidated damages against the government, they had not, in my judgment, the least power to base the allowance upon the destruction by rebel enemies of the claimant's property; and the fact that it was de-

stroyed "while being used in preparing hay under this contract," did not at all confer that power. The case, to my view, is one of the absolute absence of authority in any officer of the government, upon any ground, to pay any man, contractor or other, any compensation whatever for his property destroyed in war by the enemy, except in cases where such payment is authorized by express statute of the United States. No nation ever acknowledged itself bound, on principles of public law, to pay its citizens for their property destroyed by the public enemy in time of war. Every such principle, as well as every consideration of public policy, forbids such obligation. But any nation may, out of commiseration for individual losses, disregard those principles and considerations and provide, by express law, for such cases.

The United States did this in the second section of the act of March 3, 1849 (9 Stat. L., 414), in these words: "That any person who has sustained, or shall sustain, damage by the capture or destruction by an enemy * * * of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner, * * * shall be allowed and paid the value thereof at the time he entered the service: Provided, It shall appear that such * * * capture [or] destruction * * * was without any fault or negligence on the part of the owner of the property, and while it was actually employed in the service of the United States."

The Supreme Court held, in Stuart vs. The United States (18 Wallace, 84), that this statute was intended for the indemnity of those engaged in the actual military service of the United States; that is, for enlisted men while in performance of their duties as such; and therefore, that a contractor for land transportation of military stores and supplies was not in the military service, and could claim no benefit under that statute. And in Shaw's Case in this court (9 C. Cls. R., 388), affirmed, on appeal, by the Supreme Court (93 U. S. R., 235), where a steamer was taken into the service of the United States by a quartermaster, upon a notice to her captain that the government would
61 require her service for a trip to Memphis, Vicksburgh, and other points, accompanied by a statement of the per-diem compensation which would be allowed for its use, and for the subsistence of the men in addition to their wages and fuel for the vessel, to which notice and service no objection was made by the captain, and while engaged in the service the possession, command, and management of the steamer were retained by her owner, it was held that the steamer was not in the military service of the United States within the meaning of the act of March 3, 1849 (amended by the act of March 3, 1863 (15 Stat. L., 743, § 5), extending its provisions to steamboats), so as to make the government liable for her loss by fire.

Under these decisions there is no ground for contending that this claimant was in the military service while engaged in fulfilling the contract of July 18. Not having then been in that service, he had no claim upon the government for compensation for the destruction of hay and other property by rebel enemies; and therefore the accounting officers had no jurisdiction whatever to allow him the sums which, upon their allowance, were paid him out of the Treasury for such destruction. Because they had no such jurisdiction the payments so made to him, and his receipt of them, were both unlawful, and the United States are entitled to recover back the amount thereof by way of counter-claim in this action.

I am authorized to state that Richardson, J., concurs in this opinion.

RICHARDSON, J., dissenting:

I concur in the dissenting opinion of the chief-justice; and as to the right of the United States to recover back money paid in mistake of law by the executive officers of the government, my views are these:

The general rule recognized in this country and in England, as between individuals, although not without exceptions, is that money paid in mistake of law, when all the facts are known to the parties, and there is no fraud, cannot be recovered back by action. This rule is founded on the maxim of the civil law "ignorantio legis neminem excusat," which, in its application to the administration of the law of crimes and offenses, is a concise and correct enunciation of a sound principle on grounds of justice and public policy. But when made the foundation of a rule, that money paid in mistake of law can in no case be recovered back, unless fraud is proved, its application seems to me to be extended far beyond justification.

When one has committed a crime or offense, and has thereby done injury to persons and a wrong to the state, he may well be confronted with the maxim that "ignorance of the law excuses no one," and with justice may be compelled to submit to the penalty which the law imposes upon him for his wrongful act. But when one pays, in mistake of law, money which he does not owe, and which the receiver has no right in justice and conscience to retain, he does not, by demanding it back, commit a wrong, which he seeks to have excused on the ground of his ignorance or mistake of law; it is the receiver who does a wrong, and attempts to excuse it on the ground of mistake on the part of the person whose money he unjustly received and retains.

The rule has often been presented to courts in cases in which its application would work manifest hardship, injustice, and wrong; to obviate which it has been denied or explained away, and sometimes a nice distinction drawn between ignorance and mistake of law, by which the rule was restricted to cases of ignorance, but held not to apply to
62 cases of mistake. This distinction, although supported by strong reasons, is too subtle ever to be of much practical use and importance. The Supreme Court, in recognizing the rule, at the same time recognizes the fact that it has exceptions, and in one case attaches to it a limitation—Hunt vs. Rousmanier's Administrators (1 Peters, 15); Bank of United States vs. Daniel (12 Peters, 48).

By several courts it has been held that "money may be recovered back in an action for money had and received, where there is a full knowledge of all the facts, provided that the mistake is clearly proved, and the defendant cannot in good conscience retain it"; and, as obviating the necessity of exceptions and subtle distinctions, this would seem to be the better rule, and is supported by many authorities. (See, among other cases, Northup vs. Graves, 19 Conn., 554; Culbreath vs. Culbreath, 7 Geo., 64; Stedwell vs. Anderson, 21 Conn., 139; Underwood vs. Brochman, 4 Dana, 309; Hopkins vs. Mazyck, 1 Hill Ch. R., 242; Lawrence vs. Beaubien, 2 Bailey, 623; Lowndes vs. Chisolm, 2 McCord, Ch. R., 455; Robinson vs. City Council, 2 Richardson, 317, 320; Farmer vs. Arundel, 2 W'm Black, 825; Moses vs. McFarlan, 2 Burr, 1002.)

But whether or not the maxim of the civil law justifies the general rule, either to the fullest extent or with limitations as between individuals, there are grave reasons of public policy and justice why neither the maxim nor the rule should apply without limitation, when money is

obtained from the government through mistake of law made by its officers and agents.

The United States, as a body-politic, act only by public officers, who are special agents intrusted with specific, defined duties, and who can bind the government only to the extent of the authority conferred upon them. The state has no general agents; the President is limited in power and authority; Congress must keep within the bounds of the Constitution; the courts are restrained in jurisdiction by statute, and all public officers must obey the law. (Floyd's Case, 2 C. C. R., 599, and 7 Wall., 666.) But the acts of special agents within the scope of their authority are as binding upon the principal as are the acts of general agents.

When, therefore, public money is paid away by public officers, with a full knowledge of all the facts, but in mistake of law upon an honest interpretation and decision, it is necessary to determine how far those officers have been intrusted by the government with the power and authority to decide in such cases, before the rule can be applied in any form; because, if they have no authority to decide controverted questions of law arising in the course of their prescribed duties, the government would under no circumstances be bound by their decisions thereof.

Money is paid out from the United States Treasury upon warrants signed by the Secretary of the Treasury, countersigned by the Comptroller, and recorded by the Register (Revised Statutes, §§ 305, 313), except money of the Post-Office Department, which is drawn upon warrants signed by the Postmaster-General and countersigned by the Auditor for that department. (R. S., §§ 396, 3674.) When received by a disbursing-officer, the money still belongs to the government, and must be paid by him according to law upon vouchers taken and returned to the department for the settlement of his accounts. (R. S., §§ 3622, 3623.) Such officers are special agents, with very limited authority. Their duties are ministerial; they are to pay the money according to the law and the fact in each case, and if they make mistake in either, they are personally liable therefor themselves, and the government may also, without doubt, maintain an action to recover back the
63 money from the person wrongfully receiving it. No discretion or authority to decide controverted questions of law is intrusted to such officers.

But for the settlement of accounts against the United States there is established by law a peculiar and well-appointed system, which requires in each case careful examination and consideration, and the judgment and decision of high officers, appointed by the President with the advice and consent of the Senate, called "accounting-officers," of two distinct classes, acting separately, the Comptrollers reviewing and finally passing upon the action of the Auditors. The Auditors' duties are prescribed in Revised Statutes, §§ 276–300, and are generally "to receive and examine all accounts relating" to the different branches of the public service, "and after examination of such accounts to certify the balances and transmit the same with the vouchers and certificates to the Comptroller for his decision."

The Comptroller's duties are prescribed by Revised Statutes, §§ 268–275, and are, among other things, "to examine all accounts settled by the Auditors," and to certify the balances arising thereon; the First Comptroller to the Register, and the Second Comptroller to the head of the department in which the expenditures have been incurred. Thus the accounting-officers stand in somewhat different relations to the

government from disbursing-officers, agents, and employés, who have only ministerial duties to perform. They have larger power and greater authority, to be exercised according to their best judgment. They are to examine all accounts, the Auditors to state the balances, and the Comptrollers to decide thereon. They must, of necessity, be intrusted, especially the Comptrollers, with the important duty of passing upon all questions of law or fact which may arise in the settlement of accounts and in the decision required as to the balances to be certified.

To decide, means "to settle, to terminate, to end, to conclude; applied to what is in dispute, question, or doubt." (Worcester's Dictionary.)

A decision implies more than ministerial duties, and calls for a determination by the Comptrollers of every question which may be raised upon the accounts and balances as stated and certified by the Auditors, whose whole proceedings are subject to revision by the Comptrollers. By Revised Statutes, § 271, the First Comptroller may even direct Auditors, in case of delays which, in his opinion, would be injurious to the United States, "forthwith to audit and settle any particular account which such officers are authorized to audit and settle, and to report such settlement for revision and final decision by the First Comptroller." This authority to direct accounts to be forthwith settled, before the passage of the Revised Statutes, was understood to belong to each Comptroller alike as to accounts within their respective jurisdiction, and was so exercised; but it seems to be limited in the revision, probably by inadvertence, to the First Comptroller. We cite it here, however, only to show the duties of the Comptrollers in making their final decisions on accounts, and they are the same whether the settlements are sent up to them by the Auditors in the usual manner or by special direction. All such settlements are subject to the revision and final decision of the Comptroller.

To some extent, therefore, the Comptrollers are quasi judicial officers, and like judicial and other officers who are charged with the exercise of discretion and judgment, and unlike ministerial officers, they are not personally liable for the correctness of their decisions when acting without fraud and in good faith. In the performance of their important duties the accounting-officers may, through the Secretary of the Treasury, and often do, obtain the opinion of the Attorney-General
64 upon doubtful questions of law, as may be seen by reference to numerous printed opinions of the Attorneys-General in such cases

The accounting-officers from the first maintained the conclusiveness of their decisions, at least against all other executive officers, and controversies early arose as to how, by whom, and to what extent those decisions could be reviewed and revised. Claimants often appealed to the President against the action of those officers in settling their accounts, but it was always held, on the advice of successive Attorneys-General, that the President had no power to interfere. (1 Opin. Att'ys-Gen., 624; 2 Opin., 508, 544; 5 Opin., 630.) The Secretary of the Treasury, and other heads of departments, still continue to claim the right to revise the action of the accounting-officers, and to change the balances certified by them, and this claim was sustained by the opinions of the Attorneys-General, and was generally, though reluctantly, acquiesced in by the accounting-officers. (5 Opin., 630.)

In 1868 Congress passed the act which is embodied in Revised Statutes, § 191, as follows:

"The balances which may from time to time be stated by the Auditor and certified to the heads of departments by the Commissioner of Cus-

toms, or the Comptrollers of the Treasury upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as before provided."

This act settled a long-standing controversy between the accounting-officers and the heads of the departments, and is significant in connection with the questions now under consideration, as showing the great authority, superior to that of the highest executive officers of the government, which Congress reposes in the accounting-officers in the settlement and determination of balances of accounts with the government.

It will be observed that, by the sections of the statutes to which reference has been made, the general jurisdiction of those officers is confined to matters of account. An "account" is defined by Chief-Justice Shaw thus: "The primary idea of account, computatio whether we look to the proceedings of courts of law or equity, is some matter of debit and credit, or demands in the nature of debit and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or some fiduciary relation of a public or private nature, created by law or otherwise." Whitwell vs. Willard (1 Metc., 216).

This would exclude claims for unliquidated damages, founded on neglect or breach of obligations or otherwise, and so, by the well-defined and accepted meaning of the word "account," and the sense in which the same and the words "accounting" and "accounting-officers" appear to be used in the numerous sections of the numerous acts of Congress wherein they occur, it would seem that the accounting-officers have no jurisdiction of such claims, except in special and exceptional cases in which it has been expressly conferred upon them by special or private acts. And such has been the opinion of five Attorneys-General—all who have officially advised the executive officers on the subject: Attorney-General Taney, in 1832, whose opinion is referred to by his successors in office; Attorney-General Nelson, in 1844 (4 Opins., 65 327); Attorney-General Clifford, in 1847 (4 Opins., 627); Attorney-General Cushing, in 1854 (6 Opins., 524); and Attorney-General Williams, in 1872 (14 Opins., 24). And the same views were expressed by this court in 1866, Carmick et al. vs. United State . (2. C. C. R., 126, 140.)

The appropriations by Congress for the support of the different branches of the government, from which the balances found by the accounting-officers can be paid, are made for the payment of services rendered, materials furnished, and benefits conferred, which may be foreseen and estimated for with some degree of accuracy, and unless specifically provided for therein, do not include authority to pay unestimated and unlimited amounts which those officers, without the ordinary forms and proceedings required in the trial of controverted claims in the courts of law, might in their discretion, upon *ex parte* affidavits in their ordinary course of business, allow as damages for violated contracts.

The present distinguished head of the Treasury Department (M'r Secretary Sherman), in a circular-letter recently addressed to the accounting-officers and others, thus justly and correctly calls attention to

the admirable organization of that department to pass upon accruing demands and accounts, and the difficulties and dangers attending the allowance of other claims, and especially of those long past due. He says:

"The Treasury Department is admirably organized to pass upon accruing demands upon the government and upon the accounts of disbursing officers. All its machinery and checks are adapted to this duty, and no serious complaint has been, or is likely to be, made of the proper discharge of this duty. But when claims long past due are presented upon ex parte evidence to officers who have no means of calling witnesses, no powers to cross-examine them, no modes of testing the sufficiency of testimony or its credibility, none of the safeguards of an open court of justice, the passage of fraudulent claims is unavoidable. Congress has by law provided a Court of Claims, where, within a limited period, all demands founded upon contracts may be presented and openly tried and decided. If this remedy in any case should be insufficient, claimants can appeal to Congress, which may grant either a new trial in the courts, or a re-examination in the departments, or directly furnish such relief as it deems right and proper. The Treasury department is not a Court of Claims, and the reason for withholding the ordinary powers of such a court became apparent to Congress by actual errors that had occurred."

That public policy requires that public officers should be held to the performance of their duties within the strict limits of their legal authority, and that as a general rule the government should not be bound by their mistakes, or their errors of omission or commission, there can be no doubt; and public policy would seem equally to require that when the vast accounts of collectors and disbursing-officers, charged with responsible trusts and under heavy bonds; the complicated accounts of persons furnishing supplies to the Army, Navy, and other branches of the government; the accounts of individuals dealing in thousands of ways with the constituted authorities, as well as accounts for the salaries of public officers to whom it is often of great importance to know exactly how much they can depend upon receiving when passed upon and settled by officers of such high authority, as the accounting-officers acting within the exact scope of their authority, and the balances certified by them to the heads of the departments to which they relate, and by them directed to be paid, and then paid by warrant
66 drawn on the Treasury according to law, and the payment acquiesced in by the claimants, such settlements should be held final and conclusive on the government, unless impeached by fraud or mistake as in like cases between individuals.

M'r Justice McLean, in an opinion delivered in the Supreme Court in 1834, thus expressed his views: "The accounting officers of the Treasury act upon the accounts and give the credits as entered their official sanction. The vouchers of an individual are all submitted to these officers and their decision has always been considered as conclusive upon the government, but not so as against the individual. The law expressly provides that rejected items may be allowed by the court [referring no doubt to the provisions now incorporated into Revised Statutes, §§ 951, 952]. * * * In the performance of their official duty, the Treasury officers act under the authority of law; their acts are public and affect the rights of individuals as well as of the government. In the adjustment of an account they sometimes act judicially, and their acts are all recorded in the books and files of the Treasury Department. So far as they act strictly within the rules prescribed for the exercise of

their powers, their decisions are in effect final; for if an appeal be made they will receive judicial sanction [probably referring to the provisions now incorporated into the Revised Statutes, § 886]. Accounts amounting to many millions annually come under the action of these officers. It is, therefore, of great importance to the public and to individuals, that the rules by which they exercise their powers should be fixed and known." (United States vs. Jones, 8 Peters, 375.)

The language used by Attorney-General Browning, in an opinion given to the Secretary of the Treasury in 1868, upon the claim of a collector of customs to have the accounting-officers open and re-adjust an account settled with them, in which he claimed that errors had been made in the amounts allowed him, founded on mistake of law, although used with reference to the opening of settled accounts, at the request of a claimant, applies with equal force when the Government seeks to open the same. He says:

"It has been repeatedly held that where an account has once been duly adjusted, settled, and closed by the proper officers, with a full knowledge of all the facts, and where no errors in calculation have been made, it cannot be re-opened without express authority of law, and must be regarded as final and conclusive. No subsequent decision upon a doubtful or controverted question of law, essentially modifying a prevailing rule which was applied to the settlement of an account, would authorize the re-opening of it, with a view to a re-adjustment of it in accordance with such decision." (12 Opinions, 386.)

If the rule were otherwise, and nothing can be regarded as settled against the government in the adjustment of accounts except what is determined by the final judgment of the courts, it would follow, as no statute of limitation bars actions brought by the United States, that any account settled since the first organization of the government might be re-opened, and parties brought into court upon a claim for money paid them in mistake of law, upon the caprice of successive Comptrollers, who are by law charged with the duty of directing suits and legal proceedings to be instituted for the recovery of debts certified by them to be due to the United States (Revised Statutes, § 269), or whenever a new construction is placed on a statute, different from that which the same or a former Comptroller adopted in the settlement of earlier accounts, materially changing the balances, although there were no frauds, mistakes, or concealments of facts, and the parties
67. had dealt with the government on the basis of the former rulings, and had long acquiesced in the settlement.

But the strength of the position that money paid in mistake of law, upon the decisions of the accounting-officers "acting strictly within the rules prescribed for the exercise of their powers," with a full knowledge of all the facts and in the absence of fraud, cannot be recovered back, except in cases in which it could be so recovered under like circumstances between individuals acting for themselves, does not rest merely upon the conclusiveness of those decisions, for until they are consummated by actual payment they are not binding and conclusive, except to the extent specified in the act of 1868 before cited, (Revised Statutes, §191), and are never so regarded.

In the case of Chorpening vs. The United States (94 U. S. R., —, 12 C. C. R., —), wherein the Postmaster-General was, by special act, authorized to investigate and adjust certain claims, to be settled as therein provided, and Congress repealed the act after the Postmaster-General had found and stated a balance due to the claimant, but before the same was paid, and he sued to recover the amount so found due

him, the Supreme Court held that he had no cause of action, and in the opinion of the court M'r Justice Swayne thus refers to the powers of accounting-officers: "The adjustment having been made under a special law renders it in no wise different as regards the point we are considering from those made daily by the accounting-officers of the government, under the general law conferring their powers and prescribing their duties. The idea that the government is finally concluded by the results at which they may arrive would be regarded as a novelty within and without the several departments."

Congress, as we thus see, may interfere, and the head of a department to which a certified balance relates, if he cannot change the balance, may submit to the Comptroller any facts in his judgment affecting the same and require a decision thereon, or he may send the claim to this court for final adjudication, as has been done in many cases. (Delaware River Steamboat Company's Case, 5 C. C. R., 55; Winnissimmet Company's Case, Reybold's Case, and Hart's Case, 12 C. C. R. —.) And the Secretary of the Treasury, or the Postmaster-General, in case of accounts in his department, has the right, and it would be his duty, to refuse to grant or sign a warrant for the payment of any certified balance which, in his opinion, is wholly invalid and not provided for by an appropriation authorized by law (Constitution, art. 1, sec. 9; Revised Statutes, §§ 248, 3674, 3675, 3678), until the case had been transmitted by him to this court for adjudication or submitted to Congress for an appropriation.

It is only when payment has been made on the requisition of the head of a department and the warrant of the Secretary of the Treasury, or of the Postmaster-General in his own department, sanctioning and giving effect to the action of the accounting-officers, each acting strictly within the jurisdiction conferred upon him by law, and the settlement thus consummated has been acquiesced in by the claimant, that it would seem to be binding and conclusive in like manner as settlements between individuals.

If, however, the claimant does not acquiesce in the settlement, but brings his action in this court within the time limited by law, he cannot well object if the account is re-opened throughout, stated anew, and a balance found either way, according to the law and the facts as found by the court. A case arose in 1854 illustrative of these views. Coroners in the District of Columbia had, for a series of years, been allowed from the United States Treasury payment for fees of inquests
68 super visum corporis. A coroner whose accounts had been previously settled and paid asked for a reopening and a readjustment of the same on the ground of alleged errors on the part of the accounting-officers in not allowing him so much for fees as he was entitled to. The matter was referred to the Attorney-General, who held that coroners were not entitled to be paid anything out of the United States Treasury in such cases. In his opinion, Attorney-General Cushing said: "Whatever fees in the premises have been paid to the coroner heretofore out of the Treasury of the United States, have been paid, it seems, by traditional practice for some years, in consequence of an erroneous construction of the act of 1838, adopted without due reflection and examination of the Treasury Department. That construction was manifestly against law. I do not recommend that the coroner be called upon to refund the money he has received. The government has voluntarily paid it in its own wrong, and perhaps ought to submit to the loss. I am accustomed to advise acquiescence in what is done as done." (6 Opins., 568.) And in a supplementary opinion in the same case he adds:

"Accounts have sometimes been opened on the application of a party for the correction of a manifest error of law committed to his prejudice. But if one party insists upon having the accounts open to readjust them, in view of correcting errors committed to his prejudice, it would be right and the duty of the accounting-officers to correct, at the same time, any error committed to the prejudice of the other party. The effect of this will be, that if the accounts are reopened at the instance of the coroner, the readjustment must be complete and legal in all its parts, and he may be called upon to account for the money which he has received unlawfully heretofore by mistake of the government." (6 Opins. of Att'y-Gen., 576.)

On the whole, my opinion is that when a claimant, not acquiescing in the settlement of an account or claim by the accounting-officers and the payment thereof, brings his action in this court to recover an amount beyond what has been allowed and paid to him, the United States may maintain a counter-claim, under the provisions of Revised Statutes, section 1059, clause 2, for any money received by him on such settlement, when it appears that the officers of the department exceeded their powers in exercising jurisdiction over the claim, and mistook the law applicable thereto, and the money paid was not legally due to the claimant, and could not have been recovered by action in this court, or otherwise, and cannot in conscience be retained by him.

This is all that it is necessary to determine for the purposes of this case.

In McElrath's Case, decided at this term, McElrath had been paid half-pay, as on leave of absence, as an officer of the Marine Corps, upon the mistaken decision of the accounting-officers that he was by law a first lieutenant of that corps during the time for which he was so paid; and he, not acquiescing in the settlement, brought his action in this court for the balance of full pay. He had been an officer of the corps, sent in his resignation, which was not accepted, and he was peremptorily dismissed from office. He engaged in other occupations, performed no service for the government, and offered to perform none, and after a time, as an act of favor, the Secretary of the Navy revoked, or attempted to revoke, the order of dismissal, and accepted his resignation to take effect at the date of such revocation. During the whole intervening time his place had been filled by the appointment of another person to the vacancy created by his dismissal, and the corps had the full complement of officers authorized by law, exclusive of the claimant.

69 The court held that his attempted restoration by the Secretary of the Navy had no legal effect; that the accounting-officers erred in deciding that he was, during the time, an officer of the Marine Corps, entitled to pay; that the officers of the department exceeded their jurisdiction in paying him half pay while he was not in office, and that he had no legal claim to the money paid to him, and could not in conscience retain it. And the court gave judgment upon the counter-claim against him for the amount which he had illegally received. (12 C. C. R., —.)

In the case at bar a majority of the court hold that the clause in the contract of June 20, 1864, whereby the defendants were made to promise that "it is expressly understood by the contracting parties hereto, that sufficient guards and escorts shall be furnished by the government to protect the contractors while engaged in the fulfillment of this contract," was void, as not warranted by the advertisement inviting proposals, and as inserted without legal authority, for the reasons stated in the opinion just read by Judge Nott, in which, so far as it relates to that clause, I

concur. And a minority of the judges hold, also, that the contract of July 18, 1864, was void, because not made in conformity with the requirements of law, by which advertisements for proposals are to be published before such contracts are entered into, and if not, then that the clause promising protection, in the same language as that in the contract of June 20, above quoted, so far as it relates to property destroyed by the public enemy in time of war, was beyond the authority of the officer making the contract to insert, and was to that extent an excessive assumption of power, against public policy, and void. (Vattel's Law of Nations, 403.)

All the money paid to the claimant, which forms the subject of the counter-claim set up by the defendants, was allowed and paid in fact as damages, unliquidated damages, for breach of the agreements in the protection clauses of the contracts, on the part of the defendants, measured by the value of the claimant's property destroyed by the public enemy in time of war, for want of sufficient military escorts and other defenses and protection by the Army in the field.

The manner of estimating the claimant's damages by stating an account of his actual losses does not make this claim one of "account" within the meaning of the law and of the statutes defining the duties of the accounting-officers. In whatever form settled, it was a claim for damages.

That the claimant was not entitled to damages by settlements in the executive departments, by action in this court or otherwise, for such breach of such clauses so inserted in the contracts, and for property thus destroyed by the public enemy, I think is clearly shown in the opinion of the chief justice.

When a contract is annulled or broken on the part of the United States before completion, the contractor, waiving his claim to damages, may, if he so elects, have his accounts settled, as for part performance, at the rate and according to the conditions of the contract; and such accounts would be strictly within the jurisdiction of the accounting-officers of the Treasury Department. (6 Opins. of Att'ys-Gen., 499.) But that is not this case. The claimant's contracts were for the delivery of hay at specified places and at agreed prices, and the only part performance which could have occurred in such case would have been the delivery of a portion only of the hay contracted for. The investments of the claimant in property preparatory to or in the performance of his contracts, was not part performance of the same. And the property used by him in cutting hay was not in the service of the United States nor under their control. (Grant vs. The United States, 1 C. C. R., 61; affirmed on appeal, 7 Wall., 331, 7 C. C. R., 53; Stuart vs. The United States, 18 Wall., 84; John S. Shaw vs. The United States, 9 C. C. R., 388; affirmed on appeal, 94 U. S. R., —.)

Moreover, the claimant does not acquiesce in the settlement, but brings this action to recover an amount beyond what has been allowed and paid to him. He cannot, therefore, in law or justice, well complain if the United States, on their part, no longer acquiesce in the payment, and, in defending themselves, at the same time seek to recover back the money paid to him, without authority of law, by their special agents, acting beyond the limits of their jurisdiction.

Had the claimant himself not disturbed the settlement by bringing the defendants into this court, the United States would no doubt have abided by the action of their officers, as they have done before in hundreds of cases which must have occurred in the nature of things during the past eighty years and more, in the course of the almost countless,

multifarious, and complicated accounts which have been adjusted and settled in the departments, wherein the executive officers have acted upon interpretations of statutes and views of the law, and of their own powers and duties, honestly and fairly arrived at, as we believe they were in this case also, but which the courts, after arguments by persons learned in the law, and more thorough consideration, would be constrained not to uphold. And because the United States do not in their ordinary business disturb settlements in which the claimants acquiesce, it does not follow that they have no right to recover back payments illegally made on those which the claimants themselves re-open by actions bringing the government into court.

In my opinion the defendants are entitled to recover the amount of their counter-claims.

I am authorized to state that the Chief Justice concurs in this opinion.

71 X.—*Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 11th day of June, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Henry E. McKee, claimant, do have and recover of and from the United States the sum of sixteen thousand nine hundred and fifty-seven dollars ($16,957.00).

By the court:

A true copy of record.

72 XI.—*Application for appeal and order allowing the same.*

From the judgment rendered in the above-entitled cause on the 11th day of June, 1877, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of June, 1877, make application for, and give notice of, an appeal to the Supreme Court of the United States.

CHARLES DEVENS,
Attorney-General.

Filed June 29, 1877.

Ordered, That the application for the allowance of appeal be allowed as prayed for.

June 29, 1877.

By the court.

73 XII.—*Application of claimant for the allowance of an appeal and order allowing same.*

From the judgment rendered in the above-entitled cause the 11th day of June, A. D. 1877, in favor of the claimant, the claimant, by S. W. Johnston, his attorney, on the 7th day of September, 1877, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

S. W. JOHNSTON,
Attorney for Claimant.

Filed September 7, 1877.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

74 In the Court of Claims.

HENRY E. McKEE
vs.
THE UNITED STATES. } No. 6194.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon; of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office June 29, 1877, and of the order of the said court of claims allowing the same; of the application of the claimant's counsel for the allowance of an appeal, filed Sept. 7, 1877, and of the order of Chief Justice Drake allowing the same; of the findings of fact by the court and conclusions of law thereon; of the opinion of the court, and of the two dissenting opinions.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this twenty-seventh day of September, A. D. 1877.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 841. The United States, appellants, vs. Henry E. McKee. Filed 9th October, 1877. No. 880. Henry E. McKee, appellant, vs. The United States. Court of Claims. Filed 13th October, 1877.

RECS. 841–880—5

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES, APPELLANT,
v.
HENRY E. MCKEE. } No. 841.

HENRY E. MCKEE, APPELLANT,
v.
UNITED STATES. } No. 880.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS

SUBMITTED UNDER RULE XX. ARGUMENT FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES, APPELLANT,
v.
HENRY E. McKEE. } No. 841.

HENRY E. McKEE, APPELLANT,
v.
UNITED STATES. } No. 880.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

SUBMITTED UNDER RULE XX. ARGUMENT FOR THE UNITED STATES.

STATEMENT.

Upon the 20th day of June, 1864, Henry E. McKee agreed with Greene Durbin, quartermaster, United States Army, to deliver, according to terms of advertisement therefor, 3,000 tons of hay at Fort Gibson and vicinity, at a stipulated rate. The advertisement stated that "such military protection will be furnished as the necessities and interests of the service may admit." (Record, 13.) The contract actually entered into contained this stipulation: "V. It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to

protect the contractor while engaged in the fulfillment of this contract." (Record, 8, bottom.)

A second contract, for 4,000 tons of hay, at points 40 to 70 miles distant from Fort Gibson, was entered into July 18, 1864 (Record, 9, Ex. B), containing the same clause as is above recited from the prior contract. No advertising preceded the making of this latter agreement, which required delivery to be completed by September 25, 1864; that under the former was to be concluded on or before the first day of that month. Subcontractors were harassed by attacks of the enemy, and the execution of the work thereby delayed, though "guards and escorts were furnished as promptly as the necessities and interests of the public service permitted." (Record, 15, middle.) These escorts and guards were not sufficient for the protection of McKee and his subcontractors in their work. Had they been, he was prepared to comply with his contracts. (Record, 15.) He delivered the 1,000 tons deliverable at Fort Gibson under the first engagement, and 1,000 of the 2,000 tons which it required to be delivered at a neighboring point. Of the remaining thousand, 600 tons already cut were destroyed by the rebels, and they prevented the other 400 from being cut. Under the agreement of July 18, 1864, the claimant delivered 1,128 tons, had cut 185 tons more, which were destroyed by the rebels, and was by them prevented from cutting the remainder. Captain Durbin wrote him September 26, 1864, to discontinue further operations under these contracts.

McKee subsequently presented his claims for compensation for cut-hay destroyed as aforesaid, and, upon recommendation of the Third Auditor and Second Comptroller, was paid these items of such claims, viz: July

28, 1869, by settlement No. 1698, for 400 tons of stacked hay, at $22, and 200 tons unstacked, at $19 = $12,600, under contract of June 20, 1864; by settlement No. 3614, made April 1, 1870, as to losses under the second contract (of July 18, 1864) for hay destroyed, $3,450; abandoned, $1,890; hire of teams, $945 = $6,285. Upon the 24th June, 1872, the Auditor and Comptroller recommended payments and the Secretary of the Treasury paid out of the appropriation for the Quartermaster's Department the further sum of $16,774, "as compensation for property destroyed by rebels at Cabin Creek and near Fort Gibson, while being used by said McKee in preparing hay under his contract of 20th June, 1864, losses having been occasioned by reason of the failure of the United States to furnish sufficient guards, as stipulated in the contract." (Record, 16, 17.)

The court further found, at our request, that the claims before the Treasury Department were for or upon the basis of the contract-price of the hay, and also for its value, ascertained by its cost to him, which would seem to mean that there was *no profit* in the contract. (Record, 18; findings, I to V.)

The hay so paid for had never been delivered or accepted. (*Id.;* finding, VII.) Claimant was also paid $1,100 for his animals, machines, and stores, used in getting the hay and destroyed with it (Record, 19, top), as well as $15,674, amount by him paid to his subcontractor, Scott, for property of the latter's destroyed in the same way. (*Id.*, § IX.) These two sums were claimed in this petition. (*Id.*, § X.)

The United States filed counter-claims to recover all the aforesaid sums heretofore paid to Mr. McKee.

THE CONCLUSIONS OF LAW

to which a majority of the court arrived—two judges dissenting—were, that a recovery was to be had upon the contract of July 18, 1864, for the profits that would have been realized from its completion, viz, $29,559, but that there could be none upon the contract of June 20, 1864. (Record, 19, middle.) That the United States were entitled to have refunded the moneys paid as aforesaid under the contract of June 20, 1864, but not those so paid under the second contract of July 18, 1864. (*Id.*)

Judgment was accordingly rendered by a majority of the court for the balance of $16,957, thus found due to McKee (Record 44, folio 71), and both parties appealed.

ASSIGNMENT OF ERRORS.

The United States assign for error the judgment aforesaid, and the rejection of their counter-claims under the contract of July 18, 1864.

BRIEF.

The questions involved in this case are of unusual importance; but they have been so fully and ably considered, upon every view, by the concurring and dissenting justices of the court whose judgment is here reviewed, that they will be but briefly discussed in argument. Time does not afford the opportunity, even if the cause furnished the occasion (which, only for the reason above stated, it happily does not), for a more elaborate discussion. We therefore respectfully refer to the opinions found in the Record, pages 19 to 44, inclusive.

It will be noticed that the claim of Mr. McKee, under the first contract, was rejected, and the counter-claim of the United States was allowed, because the advertisement did not authorize the stipulation of protection; while the opposite course was adopted as to the claim and counter-claim arising under the second contract, because that was entered into without advertisement. The dissenting judges thought the agreement for protection one by which the quartermaster could not bind the government.

I.

The petitioner's first claim was for damages arising from the failure of the government to fully protect him and his subcontractors in the fulfillment of his first contract, dated June 20, 1864, whereby he lost the profits thereof, and certain property employed in performing the work.

First. Had the quartermaster the right to insert this

stipulation for sufficient escort and guards into this particular contract? It was made after due advertisement and the reception of proposals; therefore it is based upon them and its terms are limited by them so far as these things impose limitations upon the contents of any contract. If they do not form part of the final contract, they determine what it is that is to be contracted for; and any substantial and vital variation will be the execution of a different contract from that suggested by the advertisement, and for which the bidders sent in their proposals. To make such a change in favor of the contractor would be unjust toward his competitors, whose bids were based upon the theory of a strict compliance with the advertised terms.

The advertisement, proposals, and their acceptance, substantially make up the contract which is to be subsequently formally written out and executed. How important the variation was in the present instance is perceived by noting that *it constitutes the whole ground of the claim under this first contract.* The advertisement offered only such protection as the interests of the public service would permit; the contract stipulated for absolute security, and the failure to afford it arose from the necessities of the public service. Other bidders understood they must take their chances of hostile interference; Mr. McKee is promised complete immunity from it.

Second. If the clause which is the basis of his claim was improperly inserted, of course the United States have a right to a refund of its moneys paid to the claimant without any authority of law.

II.

AS TO THE CLAIM AND COUNTER-CLAIM UNDER THE SECOND CONTRACT.

1. This contract was entered into, *without any previous advertisement*, upon the 18th of July, 1864, a fortnight after the passage of the act of July 4, 1864, c. 394, c. 253, 13 Stats., 394 *et seq.;* see p. 396, sec. 4.

It will be noticed by referring to this section that the "emergency" which is to justify the omission to advertise must be one "requiring the *immediate* procurement of supplies for the necessary *movements* and *operations* of an army or detachment," &c., and not simply for its future support in fort, garrison, or quarters.

That no such emergency existed, requiring the adoption of the course pursued in this case, is evident from the period of time to be covered by the contract, and from its general tenor. It may be barely suggested that if, as supposed by Nott, J., in his able opinion, on page 23, lines 19 and 20 of the record, "the contract was in form a contract of sale and delivery, but in substance a contract for work and service," then it was not a contract for "*supplies*," within the meaning of the above-cited section, dispensing with the necessity for advertising. If, as the learned judge goes on to say (*ubi sup.*) it was the hay of the United States which was cut, it is difficult to see why or how the claimant could recover for it *as hay*, either at the Treasury Department or before the Court of Claims. Drake, C. J., with equal ability, and (as we think) better reason, meets this argument. (See Record, 33, lines 17 *et seq.*) Upon page 30, he notices that the commanding general did not de-

clare the existence of any emergency, as contemplated in the section aforesaid.

Therefore the contract was illegal and invalid, and all sums paid under it, for matters from which the government derived no benefit, may be reclaimed.

2. The clause for absolute protection was unreasonable, against public policy, illegal, and void. It was saying to the contractor, "Heads, you win; tails, I lose." If he performed the contract he was to realize the profits for which he has here obtained judgment; if prevented from performance, he recovers them as damages for the breach of this stipulation. It insured a man against the acts of the public enemy.

III.

The payments made to him by the Treasury Department were not upon any such accounts as its officers are authorized finally to adjust. They profess to be for damages, but they cannot be called liquidated damages, because the claimant does not acquiesce in the liquidation, but sues for and recovers more in this action. The items are not those which could be filed in set-off in a suit in court. (St. Louis Ins. Co. *v.* Homer, 9 Metcalf, 42.)

The opinion of Richardson, J., who is thoroughly familiar with the workings of the Treasury Department, clearly shows that the statute in conferring the authority to state accounts does not give to the Auditor and Comptroller power to usurp conclusively all the functions of a court and jury and declare what sum shall be paid as damages for torts or breaches of contract.

In Broom's Common Law—the precise page not rec-

ollected, and the work is not now in the library so that it can be ascertained—there is a statement of the meaning of the term "balance of account," as used in the act conferring jurisdiction upon the county courts. It is thus defined by Pollock, C. B.: "The term 'balance of account' means after payment of part, or after allowance of set-off, as an item in account with the agreement of the parties, which is equivalent to payment of part, and not when the plaintiff claims more than twenty pounds after a simple set-off." Avards *v.* Rhodes, 8 Exch., 316. It shows that the power to determine and act upon a balance of account is confined to items strictly of account, and not to sums stated as liquidation of damages for torts or breaches of contract. Woodhams *v.* Newman, 7 C. B., 654; Beswick *v.* Capper, *id.*, 669, being 62 Eng. C. L. Reps.

EDWIN B. SMITH,
Assistant Attorney General.

No. 841—2

IN THE

Supreme Court of the United States.

October Term, 1877.

UNITED STATES, Appellant, *v.* HENRY E. McKEE.	*No.* 841.
HENRY E. McKEE, Appellant, *v.* UNITED STATES.	*No.* 880.

Appeal and Cross-Appeal from the Court of Claims.

Submitted under Rule XX. Argument for Claimant.

STATEMENT.

On the 27th of May, 1864, Brigadier-General John M. Thayer was in command of the District of the Frontier, Department of Arkansas, with headquarters at Fort Smith, and Greene Durbin, Captain and assistant quartermaster, was chief quartermaster of said district, which was in the Indian Territory, south of Kansas and west of Arkansas. (Record, p. 12.) During the spring, summer, and fall of that year, owing to the low stage of water in the Arkansas

river, it was impracticable for Gen. Thayer's command to be supplied with grain by way of that river, for the support of the animals used by his forces, and the only other sources of grain supply were Fort Scott and Fort Leavenworth. From those points to Fort Gibson was a long route, exceedingly difficult to protect and guard against raids from the rebel troops. (*Ibid.*) Thus cut off from any direct or safe communication with any base of supplies, the command had to rely solely on grass and hay for the support of the animals. Grass was very abundant in the Indian Territory in 1864, and hay could have been put up as late as the last of October. The court below expressly finds (Record, p. 12) that it was owing to this condition of things, and to provide hay for *present* use as well as for use in the coming winter for the posts in the command, that the contracts here in question were entered into. On the day already named Capt. Durbin published in a newspaper at Fort Smith an advertisement for sealed proposals, to be received at his office in that place until the 20th of the next June. (Record, p. 12.) The proposals were to be for furnishing 3,000 tons of hay, to be delivered at Fort Gibson, and the bids were to state at what date the delivery of the hay could commence. No bid for the delivery of less than 200 tons was to be received. The proposals were to state within what time the hay would be delivered at the post, and at what distance from Fort Gibson each lot of hay would be cut. Such military protection was to be furnished as the necessities and interests of the service might admit. (Record, p. 13.) The hay was to be received by an agent of Capt. Durbin, or by the post quartermaster at Fort Gibson, who might then be serving there. On delivery and acceptance of each 200 tons payment was to be made therefor in such funds as the Government might provide therefor. Bonds with approved

security, in the amount of $500 for the performance of contracts to deliver lots of 200 tons, and in the sum of $2,000 on contracts for the delivery of lots of 1,000 tons, were to be required; and bonds for the performance of contracts for the delivery of other amounts than those above stated were to be proportioned accordingly. (Record, p. 12.) *The right was reserved to reject any and all bids, as the interest of the service might require.* (Record, p. 13.) Proposals were to be made out in duplicate, attaching a copy of the advertisement, and endorsed "Proposals for furnishing hay." (*Ibid.*) On the 16th of June, 1864, at Fort Gibson, the claimant made a proposal, in which he said: "I will deliver, as per terms of your advertisement annexed, 3,000 tons of hay at the post of Fort Gibson, C. N., for thirty ($30) dollars per ton, or the same amount, stacked within seven miles of this post, for twenty-two dollars per ton; or I will deliver any portion of the whole amount in the field or at the post, as may be desired, at the same prices. Delivering to commence by or before July 15, 1864. I offer as securities Perry Fuller and Edw. J. Brooks, both of Fort Smith, Arkansas." To this was added in a postscript: "I am prepared, on sufficient notice, to furnish an additional quantity of hay, at same prices, not to exceed in amount three thousand tons." (Record, p. 13.) From all the findings, taken together, it is very evident that no competent contractor would have undertaken these things without an understanding that sufficient guards and escorts would be furnished to protect him while engaged in the fulfilment of his contract. This, it is submitted, should have been expressly found by the court below, as requested in our brief and in the oral argument, as the testimony, without conflict, abundantly establishes what we allege in this respect.

The contract actually made pursued neither the adver-

tisement nor the proposal. Exercising the reserved discretion which, even if not reserved in terms, would nevertheless have existed, Captain Durbin agreed with McKee in writing (Record, p. 3) that McKee should deliver at Fort Gibson 1,000 tons of hay, and, at or within the distance of seven miles from said post, 2,000 tons, to be put up in good stacks of not less than 100 tons to the stack, and not less than 400 tons at one point; the delivery to commence on or before July 15th, 1864, and all to be delivered on or before the first day of the next September. McKee was to furnish the additional quantity of 3,000 tons of hay, or less, as the assistant quartermaster might elect, on receiving from said quartermaster timely notices either at Fort Gibson or within seven miles therefrom; for which additional amount he was to be paid as provided in paragraph II of the contract. Paragraph II provided that McKee should receive $30 per ton for each and every ton delivered at Fort Gibson, and $22 per ton for each and every ton delivered within a distance of seven miles, subject to the already-mentioned restrictions as to the quantity to be delivered at any one point. Payments (Record, p. 4) were to be made, on acceptance of each 1,000 tons, in certified accounts, or such funds as the assistant quartermaster might have for that purpose. In case of failure or deficiency in the quality or quantity of hay stipulated to be delivered, the assistant quartermaster was to have the right to supply the deficiency by purchase, special contract, or otherwise, and McKee was to be charged with the difference of cost. The contract then provided as follows: "*It is expressly understood* by the contracting parties hereto *that sufficient guards and escorts shall be furnished by the Government to protect the contractor while engaged in the fulfilment of this contract.*" Another clause of the agreement was, that no member of Congress, officers, or

agents of the Government, or any person employed in the public service, should be admitted to any share in the contract, or any benefit which might arise therefrom.

This contract was approved by Gen. Thayer. (Record, p. 4.)

On the 17th day of July, in the same year, at Fort Smith, (Record, p. 13,) General Thayer, in a written order, directed Captain Durbin to take immediately the proper steps for the delivery of 4,000 tons of hay at Cabin Creek, forty miles from Fort Gibson, and at Hudson's Crossing of the Neosho river, seventy miles from the fort—2,000 tons to be delivered at each of said points—and added, that should there not be time to advertise and regularly let the contract, the Captain should make arrangements for delivery of the hay on the best terms he could, but not to exceed the contract rates for delivery of hay at Fort Gibson under the existing contract. On the same day, at Fort Smith, Captain Durbin addressed to McKee, then at Fort Gibson, a letter requiring him to deliver at Fort Gibson, by the 10th of September, as per last clause of paragraph I of the contract of June 20th, the additional amount of 2,000 tons of good, merchantable timothy or prairie hay, to be inspected and accepted by the acting quartermaster at that post, or by the duly-authorized agent of Captain Durbin, for which payment was to be made as prescribed in said paragraph. The same letter tendered to McKee the refusal of delivering and putting up at Cabin Creek and Hudson's Crossing, "at each of said points on the direct route of supplies from Fort Scott, Kansas, to Fort Gibson," 4,000 tons of hay, 2,000 to be delivered at each point, by the 25th of September, the delivery to commence by the 10th of August. For each 1,000 tons of hay delivered and accepted at said points McKee was to be paid $30 per ton, in such funds as the United States might

furnish for that purpose. He was further directed to inform Captain Durbin, without any delay, of his acceptance of this offer, and, if accepted, was to inclose a guarantee in duplicate, duly stamped, in the sum of $6,000, and signed by good and sufficient sureties for the faithful performance of his subsequent agreement. On the 23d of the same month, McKee, in writing, (Record, p. 14,) acknowledged the receipt of said letter, and, after recital of the substance of its offer, said: "I will accept your proposition, *on condition that the necessary military protection be furnished at those points.*" He also enclosed bonds in duplicate as requested. There was no advertisement in this instance. (Record, p. 15.)

On the 18th of July, 1864, (Record, p. 9,) Capt. Durbin and McKee, in writing, agreed that McKee should deliver hay as contemplated in said correspondence, the hay to be put up in good stacks, of not less than 100 tons to the stack, and all to be stacked at the posts established at the specified points, at the price indicated in the correspondence, payments to be made on acceptance of each 1,000 tons, in certified accounts, or such funds as the assistant quartermaster might have for that purpose; and no member of Congress, officer, or agent of the Government, or any person employed in the public service, to be admitted to any share or any benefit which might arise from the contract. A provision of this contract is: "*It is expressly understood* by the contracting parties hereto *that sufficient guards and escorts shall be furnished by the Government to protect the contractor while engaged in the fulfilment of this contract.*" General Thayer approved this contract also. (Record, p. 10.)

Breaches of these contracts are alleged in the petition (Record, p. 1) and amended petition, (Record, p. 6,) which last alleges that the delivery of hay near Fort Gibson, and

at Cabin Creek, and Hudson's Crossing, as provided in said contracts, was prevented for about 30 days, (including the detention at Fort Gibson and Fort Scott of claimant's haying parties destined for Cabin Creek, Hudson's Crossing, and a point within seven miles of Fort Gibson,) in consequence of the neglect of the proper military authorities to furnish sufficient guards and escorts for his protection, as required by the contracts and as duly requested by him, and by reason of the military authorities requiring his employés to stop the cutting and delivery of hay, and to work for the United States, and also by reason of the seizure and use, at various times, by the armies of the United States, for military purposes, of his wagons, horses, and mules, employed in performance of said contracts. The pleading further alleges that on account of the remoteness of the said places from settlements, it was impossible to obtain men, horses, mules, or wagons to supply the place of those seized or used by the Government as aforesaid. It also alleges that performance of said contracts was also interfered with and prevented as follows: On the 2d and again on the 16th of September, 1864, haying parties of the claimant were attacked near Fort Gibson, and driven from their work by the rebels; that on the 19th of said month an attack was made by rebel forces on his haying party at Cabin Creek, and portions of the military guard and of claimant's employés were killed or captured, and the rest driven from that point towards Hudson's Crossing; and that afterwards, on the same day, under the apprehension of an immediate attack by rebel forces on the troops and haying party at Hudson's Crossing, Col. John B. Wheeler, of the 13th Kansas volunteers, the ranking officer present, ordered the abandonment of the military and haying camp, and directed the troops and haying party to proceed forthwith to Fort Scott, Kansas.

Claimant then avers that although he was prepared and ready, and offered, to perform said contracts, the officers of the United States refused to fulfil said contracts, and, although often requested by him, refused to give sufficient guards and escorts for his protection in the cutting and delivery of said hay, as provided in said contracts, whereby he was put to large additional costs and charges in the cutting and delivery of the hay actually cut; that he was prevented from cutting and delivering 400 tons of hay near Fort Gibson, 757 tons at Cabin Creek, and 1,930 tons at Hudson's Crossing, as provided for in said contracts; and that he suffered a loss of profit of six dollars per ton on the 400 tons of hay remaining to be delivered near Fort Gibson under the contract of June 20, 1864, and of eleven dollars per ton on the 2,687 tons of hay remaining to be delivered at Cabin Creek and Hudson's Crossing under the contract of July 18, 1864.

The other statements of this pleading and the statements of the further amendment (Record, p. 11) need not be noticed in this abstract.

Judgment is asked for $31,957. (Record, p. 7.)

The defendant (Record, p. 10) put in a traverse, a plea of the statute of limitations, on the ground that the supposed causes of action did not accrue within six years next before the filing of the amended petition; and a set-off and counter-claim for $34,713, for moneys paid plaintiff by accounting officers of the United States, without warrant of law, namely: for 600 tons of hay destroyed at Fort Gibson, $12,600; for 115 tons destroyed at Cabin Creek, $3,450; for 70 tons abandoned at Hudson's Crossing, $1,890; for property destroyed at Cabin Creek, $15,674; and for property destroyed at Fort Gibson, $1,099.

Replication is made that the causes of action accrued within six years before the commencement of the suit.

The set-off and counter-claim are met by the replication with a denial of the alleged indebtedness to the defendants. Claimant here denies that the said sum of $34,713, or any part of it, was paid to him without warrant of law; and alleges that said sum, and every part thereof, was *voluntarily and lawfully paid to him* by the defendants, by way of reimbursement and compensation for actual expenses and losses of the plaintiff in and about the performance and attempted performance of valid contracts between plaintiff and defendants, said contracts being the same mentioned in the petition and amended petition.

During July, August, and September, 1864, active hostilities existed along the route between Fort Gibson and Fort Scott. (Finding XI, Record, p. 15.) Armed forces of the rebels were frequently along that route, and in the vicinity of the hay stations, with a view of capturing detached parties and attacking supply trains. Large parties of their forces appeared frequently in the immediate neighborhood of Fort Gibson. At that time (finding X, same page) the only United States troops that did permanent duty in the Indian Territory were the Indian brigade, and they were frequently inside fortifications. A great portion of the time other troops were temporarily on duty there. Gen. Thayer had to keep open a supply-route between Fort Smith and Fort Scott, a distance of about 250 miles, on which line lay Fort Gibson, distant from Fort Scott, 165 miles, Cabin Creek, 55 miles north of Fort Gibson, and Hudson's Crossing, 85 miles from Fort Gibson.

No working parties were allowed to go out from any of the posts within the District of the Frontier without military protection. (Rec. p. 15, finding XI.)

Because of the just-indicated condition of things it was, finds the Court of Claims, impracticable for Gen. Thayer always to avoid delays in furnishing military protection to

parties working under the claimant, or under his subcontractors, in making hay; but, in every case, guards and escorts were furnished by him as promptly as the necessities and interests of the public service permitted. (Record, p. 15, finding XI.) The court finds, however, that, at the commencement of the work, under the first contract, claimant was delayed about 20 days for want of military protection; on the 2d of September, the party of subcontractor A. Cohen, working under that contract, was compelled to suspend work for eight days, in consequence of an attack made by the rebels; that E. C. Amsden, a subcontractor for putting up hay at Hudson's Crossing, was delayed two weeks at Fort Gibson, waiting for an escort, and so prevented from setting out to the crossing; and that Geo. W. Stotts, a subcontractor for putting up hay at Cabin Creek, was compelled to wait eight days at Fort Gibson for an escort and guard, after he had applied therefor. Though guards and escorts were furnished in as great strength as the necessities and interests of the public service allowed, they were not sufficient to resist the attacks made upon them by rebel forces, and it is expressly found that if sufficient resisting and protecting forces had been furnished, the claimant was prepared to furnish all the hay required to fill the contracts. (Record, p. 15, finding XII.)

September 2, 1864, on the prairie, within seven miles from Fort Gibson, 400 tons, stacked, and 200 tons in process of being stacked, were destroyed by rebel enemies. (Record, p. 16, finding XIV.)

September 19, 1864, an overpowering rebel force destroyed, at Cabin Creek, 115 tons, cut there for delivery under the contract of July 17; after which destruction no military protection was afforded for haying parties at that place, and consequently no further work was done by claim-

ant toward delivering hay at that point. (Record, p. 16, finding XVI.)

On the same day, a subcontractor being engaged with a party in cutting hay at Hudson's Crossing, under the last-mentioned contract, information reached there of the attack at Cabin Creek, and Col. Wheeler, of Thirteenth Kansas Infantry Volunteers, ordered the camp at Hudson's Crossing to be abandoned, and the haymakers, with their guards, to fall back on Fort Scott, which was done. The haying party had then cut 70 tons of hay, which was abandoned in the abandonment of the camp. Thereafter, no military protection was afforded for parties to cut hay at Hudson's Crossing, and no further work was done there under that contract. (Record, p. 16, finding XVII.)

At the time of the destruction of the 600 tons of hay on the prairie, within seven miles from Fort Gibson, animals, machines, and stores, belonging to McKee, and used in preparing hay, were captured and destroyed by rebels. This property was valued at $1,100. (Record, p. 19, additional finding VIII.)

Sept. 26, 1864, Captain Durbin, by letter to McKee, ordered the putting up of hay at Cabin Creek and Hudson's Crossing to be stopped immediately, on the ground that the best interests of the Government would not admit of running the risk of protecting forage at those points, as the garrisons were necessarily small, and also ordered to be stopped at once the further delivery of hay under the contract of June 20, arranging for the putting up of 2,000 tons within seven miles from Fort Gibson. The Captain said: "It is not deemed advisable to complete these contracts any further, except for the delivery of hay at the post of Fort Gibson." (Record, p. 18, finding XX.)

The 1,000 tons required, by the first contract, to be delivered at Fort Gibson were delivered there, and paid for

at the contract price; and of the 2,000 tons required by that contract to be delivered, in stacks, at or within seven miles from Fort Gibson, 1,000 tons were there delivered in stacks, and paid for at the contract price. (Record, pp. 15, 16, finding XII.)

Of the 3,000 tons deliverable under that contract, irrespective of the order given by Captain Durbin, in his letter of July 17, and of the 600 tons destroyed by rebels, as already shown, there remained to be delivered 400 tons. These the claimant was prevented from delivering because, in consequence of the attacks of the rebels upon and the capture by them of other parties of haymakers, twelve miles from Fort Gibson, the commander of said post ordered into it all the parties engaged in cutting and putting up hay to fulfil that contract, and would not permit them to go to work again under that contract. (Record, p. 16, finding XV.)

Under the second contract, McKee delivered at Cabin Creek 1,128 tons of hay, for which he was paid the contract price. (Record, p. 16, finding XVI.)

If the claimant had been enabled to cut and deliver, and had been paid for, all the hay called for by the contracts on which he sues, he would have realized a profit of six dollars per ton on the 400 remaining to be delivered under the first contract, and a profit of eleven dollars per ton on the 757 tons remaining to be delivered at Cabin Creek, and a like profit on the 1,930 tons remaining to be delivered at Hudson's Crossing. (Record, p. 18, finding XXI.)

Claimant was paid by the Secretary of the Treasury, out of the appropriation for the Quartermaster's Department, and on the recommendation of the Third Auditor, concurred in by the Second Comptroller, $8,800, as compensation for the 400 tons of hay stacked, and $3,800 as compensation for the 200 in process of being stacked, which, as already

shown, were destroyed by rebel enemies on the prairie within seven miles from Fort Gibson. (Record, p. 16, finding XIV.)

Claimant, in addition to that compensation, received from the Secretary of the Treasury, out of the appropriations for the Quartermaster's Department, and, on the recommendation of the Third Auditor, in pursuance of a decision made by the Second Comptroller, $6,285: first, on account of hay destroyed, as has been shown, at Cabin Creek, Sept. 19, 1864, ($3,450;) second, on account of hay necessarily abandoned and lost, as has been shown, at Hudson's Crossing, on the day just named, ($1,890;) and third, on account of hire of teams used by the authorities of the United States in that abandonment, ($945.) (Record, p. 17, finding XVIII.)

The Secretary of the Treasury likewise paid to McKee, out of the same appropriation, and on the recommendation of the Third Auditor, under a previous decision of the Second Comptroller, $16,774, as compensation for property destroyed by rebels at Cabin Creek and near Fort Gibson while being used by claimant in preparing hay, the said losses having been occasioned by reason of the failure of the United States to furnish sufficient guards. (Record, p. 17, finding XIX.)

At the instance of defendants the Court of Claims additionally found that the claimant presented his claim to the Treasury Department for the contract price of the 400 tons mentioned in finding XIV. (Record, p. 18, additional finding I.)

Also, that for the 200 tons mentioned in that finding, he claimed before the Treasury Department $19 a ton, being the contract price, less the stacking. (Record, p. 18, additional finding II.) And that for the 115 tons mentioned in finding XVI, he claimed before the Treasury Department the

contract price, (Record, p. 18, additional finding III;) and also that for the 70 tons mentioned in finding XVI, he claimed before the Treasury Department the contract price, less the cost of stacking. (Record, p. 18, additional finding IV.) Additional finding V, allowed at the same request, sets forth that these claims were for the value of the hay, as measured by the cost to claimant himself, and that he stated in an affidavit accompanying the claims "that the actual cost of putting up the hay was but little, if any, less than the contract price, and in some cases was not covered by the contract price; that from the time at which the estimates were made and the contract let, to the time at which the material and supplies were purchased, gold had advanced from 60 to 80 per cent. premium; that the prices for labor, material, and supplies were regulated by this standard, and actually advanced more than 50 per cent. in the market during the time this work was being done, and your deponent was obliged to pay therefor upon that basis." (Record, p. 18, additional finding V.)

Additional finding (Record, p. 18) is that the hay thus claimed and paid for had not been delivered to, accepted, or measured by the officers of the United States, and was in the possession and control of the claimant at the time of its destruction.

Next we have the additional finding that certain already mentioned animals, machines, and stores belonging to claimant, and used in the preparation of the hay, (being the same animals, etc., already mentioned in the present statement as captured and destroyed by the rebels at the time of the destruction of the 600 tons of hay specified in finding XIV,) were valued at $1,100, and that McKee has been paid that sum for them, on the allowance of the Third Auditor and Second Comptroller. (Record, p. 19, addi-

tional finding VIII.) Then appear two additional findings, in these words:

"At the time of the destruction of the 115 tons mentioned in the XVIth finding, George H. Stotts, a subcontractor under claimant, owned and used, in the preparation of said hay, certain wagons, mules, machines, hay-forks, and also owned certain flour, sugar, corn, &c., all of which was captured or destroyed by the rebels. McKee settled with Stotts for this property, at a valuation of $15,674, and has been paid that sum for the same by the Treasury Department.

"These two sums, $1,100 and $15,674, were allowed on the 21st June, 1872, and were payment for the property mentioned in claimant's petition, filed in this Court of December term, 1870, and valued therein at $1,099 and $15,674." (Record, p. 19, additional findings IX and X.)

On looking at finding XIX, (Record, p. 17,) it will be seen that the sum of $16,774 there mentioned is the sum of the two payments, pointed out in additional findings IX and X.

As for the claim made in the original petition, it is enough to say that the amended petition claims nothing where, since the filing of that petition, payment has been made to claimant. The original petition was filed July 14, 1870; the payment now in question was not made till on or after June 24, 1872. The original petition claimed $50,143; the amended petition, as already shown, claims only $31,957.

CONCLUSIONS OF LAW.

A majority of the court agreed in the following conclusions of law:

I. That the claimant is not entitled to recover on the contract of June 20, 1864.

contract price, (Record, p. 18, additional finding III;) and also that for the 70 tons mentioned in finding XVI, he claimed before the Treasury Department the contract price, less the cost of stacking. (Record, p. 18, additional finding IV.) Additional finding V, allowed at the same request, sets forth that these claims were for the value of the hay, as measured by the cost to claimant himself, and that he stated in an affidavit accompanying the claims "that the actual cost of putting up the hay was but little, if any, less than the contract price, and in some cases was not covered by the contract price; that from the time at which the estimates were made and the contract let, to the time at which the material and supplies were purchased, gold had advanced from 60 to 80 per cent. premium; that the prices for labor, material, and supplies were regulated by this standard, and actually advanced more than 50 per cent. in the market during the time this work was being done, and your deponent was obliged to pay therefor upon that basis." (Record, p. 18, additional finding V.)

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CONCLUSIONS OF LAW.

A majority of the court agreed in the following conclusions of law:

I. That the claimant is not entitled to recover on the contract of June 20, 1864.

II. That he is entitled to recover on the contract of July 18, 1864, the profits he would have realized if he had been enabled to perform, to wit, the sum of $29,559.

III. That the defendants are entitled to recover upon their counter-claim the moneys paid by them to the claimant for hay destroyed under the contract of June 20, 1864, to wit, the sum of $12,600.

IV. That the defendants are not entitled to recover upon their counter-claim for moneys paid by them to the claimant for hay and property destroyed under the contract of July 17, 1864.

ASSIGNMENT OF ERRORS.

The claimant assigns for error, *first*, the conclusion that he is not entitled to recover on the contract of June 20, 1864, and the judgment founded on that conclusion; *second*, the conclusion that the defendants are entitled to recover on their counter-claim the moneys paid by them to the claimant for hay destroyed under the contract of June 20, 1864, and the judgment founded on that conclusion.

BRIEF.

The learned counsel for defendants very properly sets out in argument with the remark that the questions involved in the case are of unusual importance. To discuss them satisfactorily without an oral argument is very difficult; but to wait for the opportunity of orally presenting them to the consideration of the Court is not consistent with the interests of the claimant, who has had, already, ample reason to regret "the law's delay."

We follow the example of the learned counsel on the other side in asking the attention of this Court to the opinions expressed by Judges of the Court from whose decision we appeal. But we conceive that we cannot discharge

our duty thoroughly without subjecting those opinions to a free though perfectly respectful criticism. Criticised in a becoming manner, they may greatly aid the high tribunal now addressed to make a salutary settlement of the uncommonly important questions which a careful study of the record must encounter.

I.

I. Was the contract of June 20, 1864, in any measure violative of the law of March 2, 1861, providing for advertisement in a class of cases, and dispensing with it when to require it is forbidden by a public exigency? That act, which is to be found in the Revised Statutes, p. 738, § 3709, and in 12 Statutes at Large, p. 220, presents to the construction of the Court these words:

"That all purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

Mr. Justice Nott, referring to the contract of June 20, 1864, describes it as "founded on a quartermaster's ad- "vertisement for proposals." (Record, p. 20.) We respectfully submit that this is a quite serious mistake. The contract in question here was made *after* but not *pursuant* to the advertisement pointed out in the foregoing statement. Neither the quartermaster nor the contractor was compelled to adhere to the advertisement or to the proposal. Either

could, and both evidently *did*, change their minds. The contract is the only evidence of the final agreement of the parties, and both the advertisement and the proposal were merged in it.

Mr. Justice Nott also said, (Record, p. 20:) "This advertisement called for the delivery of 3,000 tons of hay at Fort Gibson, and promised the contractor 'such military protection' 'as the necessities of the service may admit.' The contract departed from its terms in dividing the quantity of 3,000 tons into two parcels, one to be delivered at Fort Gibson, at $30 per ton, the other, seven miles distant, at $22, and covenanting to protect the contractor while engaged in the fulfilment of this contract. Because of these discrepancies it is insisted by the defendants that the contract was void, and that no action can be maintained upon these breaches.

"As to the first discrepancy, the act of 2d March, 1861, (Stat. L., p. —, § 10,) though it requires a contracting officer to advertise, still leaves with him a very large discretion. The time is not prescribed, nor the form, nor the substance of the advertisement, nor is the officer even restricted to accepting the lowest bid. In this the statute differs from other advertisement acts, and notably from the post-office act, which recently received a liberal construction from the Supreme Court. (*Garfielde's case*, 11 C. C. R., 322.) Dividing the hay into two parcels, deliverable at different places at different prices, was a variation, in the judgment of the contracting officer, for the benefit of the Government, and fairly within his discretion. Such discretion has been exercised by officers of the Quartermaster's Department ever since the first advertisement act was passed. * * *

"The second discrepancy between the advertisement and the contract, or, rather, between the proposals and the

" contract, forms the foundation and subject of this cause " of action. What the claimant sues upon was not offered " by the advertisement nor stipulated by the proposals, but " was a subsequent obligation, *thrust* into the formal con- " tract. The thing to be furnished by the contractor re- " mained the same; the price to be paid by the Govern- " ment remained the same; and then, in addition to the " bargain made by the advertisement and proposals, the " quartermaster *gratuitously* gave to the claimant a guar- " antee of insurance against war-risks, upon which, exclu- " sively, his present demand is founded."

The italics are ours. We have chosen to mark the words *thrust* and *gratuitously* because their use, in the connection, was not merely unwarranted by the evidence in the case, but was expressly forbidden by it; was not in agreement with the indications of the findings of the Court, and was at war with the presumptions applicable to official conduct. It is utterly improbable that the guarantee in question was gratuitously given. Not a single reason could be offered for supposing such a guarantee to have been *thrust* into " the formal contract," as imagined by the learned judge. Why say " the formal contract?" Had there been a contract wanting due formality? There had been no informal contract. There had been no contract whatever till the paper under notice was completely signed. Till then, it is quite clear, no one was bound. Indeed, the advertisement had expressly warned the bidders that it was not itself to be taken as a proposal, the acceptance of which, with the acceptance of a counter-proposal, would constitute a contract; for the advertisement said: " The right is reserved " to reject any and all bids, as the interests of the service " may require." (Record, p. 13.) But no such reservation was necessary. Had there been no reservation, the officer would still have been entirely unbound. But if he was

not bound, how could McKee be bound before a mutual agreement had been arrived at, reduced to writing, and signed by the parties to it? The law required that the contract should be reduced to writing and signed by the contracting parties. (R. S., p. 743, § 3744.)

It is not a little remarkable that this able and usually careful judge should, in the next sentence, speak of "the "bargain made by the advertisement and proposals." The use of these words was a necessity of the argument, for, in order to invalidate a provision of this contract the Court was driven to assume the anomalous position that "pro- "posals *respecting* a contract," under the act of March 2, 1861, are so vital and binding that they cannot be departed from without giving explicit and formal reasons for such departure.

We have already mentioned that the contract does not follow either advertisement or proposal. According to the learned opinion we are noticing, where the departure was for the benefit of the Government, such departure was within the discretion of the quartermaster, and valid; but in so far as the departure was beneficial to the contractor, it was not within the discretion of the officer, and, therefore, invalid. We cannot so view the law.

Each stipulation of this contract bears up all its other stipulations. The presumption of official rectitude is fully applicable; and a fact *presumed* is at least as fully established as a fact directly *proved*. With great respect, we much prefer the *presumption of the law* to the *assumptions* here in question.

The foregoing statement shows that McKee was at Fort Gibson when he made his bid, and said that he was prepared, on sufficient notice, to furnish an additional quantity of hay at the same prices, not to exceed in amount 3,000 tons. That was on the 16th of June. The contract was

not signed till four days afterwards, and this was at Fort Smith. At that time, we have pointed out, the only troops doing permanent duty in the country under notice were the Indian brigade. There is good reason for supposing that McKee, in passing from Fort Gibson to Fort Smith, and giving such reflection, as a man of business would naturally give in circumstances of great hazard, to the enterprise he contemplated, came to the conclusion that he must insist on a guarantee of sufficient guards and escorts to protect him while engaged in the fulfilment of his contract. In anticipation of "raids from the rebel troops," (see findings II, X, and XI, pp. 12 and 15,) and, in view of the losses he subsequently sustained, the contractor rightfully insisted upon a change in the extent of the protection mentioned in the advertisement. To carry on the contract would require the use of property of the value of fully fifty thousand dollars, which he would have to bring from a great distance, and, under the circumstances, no man of means and ordinary prudence would undertake it without a guarantee of protection; and men of means, acquainted with the circumstances, could not be induced to sign his bond as securities for the performance of the contract without such guarantee.

It is proper to state that similar contracts made within the command of Gen. Thayer, rightly named the District of the Frontier, and army contracts for transportation, &c., on our Indian frontier, usually contained a like guarantee of protection or of indemnity against losses, as appears in cases decided by this Court and the Court of Claims.

In the circumstances of danger and uncertainty existing within the Indian country, depending principally for its protection on an Indian brigade, the claimant would, on reflection, naturally apprehend that, in the progress of the work desired by the Government, danger to life and the loss of his property and the product of his labor would be

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imminent, and it is not too much to affirm that in the then condition of affairs only an improvident, reckless, or foolish man would have concluded a contract for such work without a perfect guaranty of protection.

One of the parties must agree to bear the losses that might occur, and in the nature of things, who should, and probably would, assume this responsibility, the party who regarded the cutting and delivery of the hay as a military necessity, or the one free to undertake it or let it alone?

After reading the comments found in this record and in the brief of defendants, on the clause providing for the protection of the contractor "while engaged in the fulfilment" of his contract, one might be prone to infer that, to the judicial and legal mind, the concluding and signing of a contract, by which a man places himself and his property in the military service, is a light and pleasant affair. It is to be presumed that the novelty and attractiveness of giving your person and property to the service would be enhanced by finding it composed of half-civilized Indians.

In an undertaking with associations so alluring and engaging, the claimant should have made haste to sign a contract without a guarantee of protection or of indemnity for losses. He should have literally thrust himself with his property into the military service and the work required, without any assurance whatever. And from his presumable anxiety to get in, it is passing strange that the quartermaster should "gratuitously have given the claimant a guarantee or covenant of insurance against war-risks."

That this claimant actually *did* insist on the guaranty in question there is ample reason to believe. That Capt. Durbin was entirely warranted by his official power and discretion to accede to his demand, in that respect, appears to us quite clear. On the other hand, it seems not to have occurred to the court below that the contractor is in no way

restricted to the advertisement or his proposal, and that before concluding a contract, he, as well as the officer, may insist upon a change of terms.

The learned opinion of Chief-Justice Drake, dissenting in the Court of Claims, (Record, p. 27,) takes pains to show, if possible, that there was no such "public exigency" as authorizes dispensation with advertisement. But it strangely fails even to undertake to establish that, where there has been no such dispensation,—where there has been an advertisement,—where the advertisement is entirely regular,—the contract comprehends the advertisement, or must not depart therefrom.

The act of March 2, 1861, does not even *purport* to require accordance of the contract with the advertisement.

The language is, in part, that "all purchases and contracts for supplies and services" (excepting personal services) "shall be made by advertising a sufficient time previously for proposals respecting the same." Does this mean that the contemplated contract shall be *contained* in the advertisement? Surely not. Does it mean even that the *terms* of the contemplated contract shall be set forth in the advertisement? Surely not. The advertisement is, indeed, to be *respecting* the intended purchases or the desired services, and something to indicate the *general nature* of them obviously would be proper, if not necessary; but all this is very wisely left to the discretion of the officer who is to purchase or contract.

What he is to secure, if possible, is proper information as to what he can accomplish for the benefit of the Government.

To his discretion is left also the question of sufficient advertisement, in point of *time*.

Nowhere does the statute intimate that variance between the advertisement and the contract is even *prohibited*. Of

course, then, no one will pretend that the statute in terms declares that such variance shall deprive the contract of *validity*.

Nor does the statute intimate, nor does its reason require, that the contract shall be made with, or the purchase made of, a person who has put in a bid. The public policy relating to the subject evidently dictates that the contracting or purchasing officer shall be left entirely free, down to the latest moment, to effect the best transaction that he can, with justice, for the public benefit, with any person whomsoever. The proposers ought to have no preference or privilege.

The true reading of the statute, so far as it here requires construction, makes it mean that the contracts or purchases shall be made *after* advertisement, the word "*by*" here denoting no more than *after*. (See *Speed's case*, 8 Wallace, 77.)

The construction here given to the statute, by way of argument, is not in conflict with any ruling either of the Supreme Court or of the Court of Claims. According to the rulings of both Courts, the contract is the evidence of the final agreement of the parties; and the advertisement can be referred to only for light as to the meaning of the contract, when, upon the common principles of construction, the interpretation of the contract may resort to evidence beyond the words to be construed. When no construction is called for by ambiguity or uncertainty of language, no resort to the advertisement can be called for.

In *Gibbon's case*, (5 C. C., 416,) was said: "The statu-
" tory advertisement for proposals does not enlarge, control,
" or change the express terms of the contract, and is to be
" considered as merged therein." This doctrine is reaffirmed in *Harvey's case*, (8 C. C., 501,) as follows: "The
" advertisement, and the proposal in response thereto, do
" not form a part of the subsequent contract, and *cannot*
" *be admitted* to contradict or vary the terms thereof."

A contract is only complete and binding when a proposition made by one party is met by an acceptance on the part of the other, which corresponds with it entirely and adequately. (*Mayer's case*, 5 C. C., 317.)

A contract not in writing, as required by this act, is void. (*Lindsey's Case*, 4 C. C., 359; *Henderson's Case*, Ib., 359.)

Now, these decisions are irreconcilable with the idea that the contract must pursue the advertisement. They cannot be reconciled with the idea that the contract depends for its validity on its agreement with the advertisement.

We have not the slightest doubt, however, that, even in the absence of an "exigency" of the nature contemplated by the act of 1861, and of an "emergency" of the description contemplated by the act of 1864, a contract made without advertisement may be fully valid, for the reason that those acts, respectively, are merely *directory*, so far as their provision for advertisement is concerned.

The views of Mr. Sedgwick on this subject, as those views are indicated in his work on *Statutory and Constitutional Law*, p. 368, and following pages, are unphilosophical, and they cannot be reconciled either with *legislative* indications or with the opinions of the *judiciary*. That writer undertakes, without the slightest reason, to disturb a settled, and we think essential, rule of statutory and constitutional construction.

On the other hand, this Court, in *Harris* v. *Runnels*, (12 How., 79,) well holds that, before the rule that a contract in violation of a statute is therefore invalid, can have application to a statute that does not declare that such shall be the legal consequence of violation, the enactment as a whole must be examined, so as to discover whether or not the Legislature meant that a contract out of harmony with it is, on that account, to be held void. Having, with

expressions which we have not used, laid down the substance of the doctrine just set forth, the Court proceeds to say: "In other words, whatever may be the structure of "the statute in respect to prohibition and penalty, or "penalty alone, that it is not to be taken for granted that "the Legislature meant that contracts in contravention of "it were to be void, in the sense that they were not to be "enforced in a court of justice. In this way, the principle "of the rule is admitted without at all lessening its force, "though its absolute and unconditional application to "every case is denied. It is true that a statute containing "a prohibition and a penalty makes the act which it pun-"ishes *unlawful*, and the same may be implied from a "penalty without a prohibition; but it does not follow that "the unlawfulness of the act was meant by the Legislature "to avoid a contract made in contravention of it. When "the statute is silent, and contains nothing from which the "contrary can be properly inferred, a contract in contra-"vention of it is void. It is not necessary, however, that "the reverse of that should be expressed in terms to ex-"empt a contract from the rule. The exemption may be "inferred from those rules of interpretation to which, from "the nature of legislation, all of it is liable when subjected "to judicial scrutiny. That *legislators* do not think the "rule of universal obligation, or that upon grounds of "public policy it should always be applied, is very certain. "For, in some statutes, it is said in terms that such con-"tracts are void; in others, that they are not so. * * * "It must be obvious from such diversities of legislation "that statutes forbidding or enjoining things to be done, "with penalties accordingly, should always be fully exam-"ined before courts should refuse to give aid to enforce "contracts which are said to be in contravention of them."

We refer also to *Bank U. S.* v. *Dandridge*, 12 Wheat.,

64; *Thompson* v. *Carroll*, 22 How., 422; *Cole* v. *Green*, 6 Man. & Gr., 872, 890; *Holland* v. *Osgood*, 8 Vt., 279; *Pease* v. *Morrice*, 2 Ad. & El., 96; *Bladen* v. *Philadelphia*, 60 Penn. State, 466.

The cases in the Court of Claims, in which the distinction between mandatory and directory legislation is acknowledged, are, we respectfully venture to remark, more interesting than consistent. We refer, however, to this language of Mr. Justice Nott, in the extremely interesting case of *Reeside*, (2 C. C., 23,) the act referred to being that of March 2, 1861: "Without now holding that this statute "is merely directory, and that where a contract is, in good "faith, made by a General intrusted with an important com- "mand, he will be deemed intrusted with the power of de- "termining the question of exigency, it is enough to say "that here was an exigency greater than was ever contem- "plated by the framers of the law, and that the object of "the contracts was to procure an immediate delivery of "the articles purchased."

If officers intentionally violate directory provisions of the law, they may be punished; and if parties dealing with them join in purposed violation of the law, the consequence may sometimes be that they shall forfeit all advantage of these acts; but about the wisdom, nay, necessity, of the general rule, observed in *Harris* v. *Runnells*, *supra*, there should be no question at this day.

We feel as confident that the provision of the act of March 2, 1861, for advertisement, is not mandatory even in a time of peace. To hold it to be mandatory in the midst of civil war would be decidedly unwise.

An already cited opinion of Mr. Justice Nott presents this language, also: "It appears to me useless to speak of "law—meaning thereby the laws of peace—when the state "of war actually exists. Statutes and decisions have then

" no authority, and war changes the views as to the acts " of the body politic. * * * This surrender of its " power and functions the law recognizes and regulates by " an expressive maxim—*Inter arma silent leges.* The " maxim expresses with wonderful precision the exact " limits to which the state of war must be confined. It " will be observed that the law does not become silent in " the *neighborhood* of martial events, but in their *midst;* " and, even amid such events, the law is not abrogated or " repealed, or even suspended, but simply refrains from " speaking, and is, of its own accord, silent and unenforced. " When the state of war has passed, the law resumes its " sway. It does so instantly, and of its own vigor. Yet " it recognizes the changed circumstances which may have " been recast in this crucible of war. Without the inter- " position of statutes or treaties, it perceives that what was " lawful has become unlawful, and what was unlawful has " become lawful. * * * The law always recognizes " facts as they exist after the state of war has passed, and " it never attempts to undo or change what war has done." (*Reeside's case, supra.*)

Is it unreasonable to consider that a state of war may modify the rule, *essentially judicial in its origin*, that ordains the consequences of violating or departing from commandments of the law, in time of peace?

But, as already shown, there is no reason for considering at any time that a contract made under the advertisement act of March 2, 1861, must pursue the advertisement.

II. Now, however, we must face the notion that there is something very lawless, if not very dreadful, in the provisions of the contracts here in question, for sufficient guards and escorts to protect the contractor in the fulfilment of his contract. We are told that " if that quarter-

"master could have legally made such a contract, of "course every other quartermaster in the army could have "done the same;" and that "if quartermasters and dis- "trict commanders could so bargain away the troops for "the protection of contractors, then the troops would not "be in the service of the Government but of the contrac- "tors." We regard such writing as rather more rhetorical than reasonable, though the language under notice issued from the pen of a distinguished judge, of universally acknowledged learning and ability. (Record, p. 31; Opinion of Chief-Justice Drake.)

There is no "bargaining away" of troops, to be considered by a study of this record. The contractor was not led to fancy that the paramount consideration was his undertaking to make hay, and so make money in the service of the Government. Yes; in the service of the Government; for, to all intents and purposes, McKee was put into the public service by the contracts under notice.

"Any person," says a statute of the United States, which was in force at the time in question—"any person who "shall contract to furnish supplies of any kind or descrip- "tion for the army and navy shall be deemed and taken as a "part of the land or naval forces of the United States, for "which he shall contract to furnish said supplies, and be "subject to the rules and regulations for the government "of the land and naval forces of the United States." (12 Stat. L., p. 596, § 16.)

Aside from this, the statement that precedes this argument quite clearly shows that McKee was not allowed the ordinary liberty of a contractor. (Record, p. 15, finding XI, p. 16, finding XVII, p. 18, finding XX.) Neither he nor any of his subcontractors could take out, or send out, any haying party without military protection, though he or they might be more than willing to take all the risks of

"as twenty to one that before the compliance the contractor "would suffer just what occurred." (Record, p. 31, opinion of Chief-Justice Drake.) The peril of hypotheses placed on mere probabilities has been quite frequently thrown into strong relief. We think, however, that if there were probabilities of the description indicated in the words just quoted, the legitimate authorities of the United States, in 1864, were hardly equal to the duties wherewith they were charged. There was no reason in the world why McKee should not have had all the protection called for by the guarantee in question. Gen. Thayer may not have been well supplied with men and arms, but *if* not, *why* not? Certainly, he might have been.

We close our discussion of this topic by adopting the following words of Mr. Justice Nott: "Can it * * * "be held that the covenant was not a moving consideration "for the contract, without which the contractor would not "have entered into it, or that it is not as obligatory upon the "defendants as any obligation which he had assumed on the "faith of it? As was said by the learned counsel who "represented the claimant on the first trial of this case, "'there was a war-risk to be run, and the question when "they made the contract was, which party should bear it?' "The contract, recognizing the risk, answered that it should "be upon the defendants; and the obligation thus assumed "was analogous to those numberless charter parties, made "during the war, where the Government agreed to assume "the war-risks of the vessels which it chartered, though "manned and navigated by the owners—agreements, the "validity of which has never been questioned in the Su-"preme Court nor in this."

III. The learned counsel for the Government insists that the contract having been made after due advertisement and the reception of proposals, is therefore based on them,

and its terms are limited by them so far as those things impose limitations upon the contents of any contract; that if they do not form part of the final contract, they determine what it is that is to be contracted for; that any substantial and vital variation will be the execution of a different contract from that suggested by the advertisement, and for which the bidders sent in their bids, and that to make such a change in favor of the contractor would be unjust towards his competitors, whose bids were based upon the theory of a strict compliance with the advertised terms. But we have shown that the bids could not have been based on any such theory. We have shown that there was a reservation of the right to reject any and all bids, and that there would have been such a right without express reservation. Now, the right to reject must include the right to modify. There was to be no sort of favor. No one could acquire a preference. The bid accomplished nothing in the way of obligation, and the advertisement accomplished nothing in the way of contract. Bidders suffered no legal prejudice in the rejection of their bids.

II.

I. Consideration of the contract, dated July 18, 1864, involves construction of the act of July 4, 1864, in which we have these words:

"When an emergency shall exist requiring the immediate procurement of supplies for the necessary movements and operations of any army or detachment, and when such supplies cannot be procured from any established depot of the Quartermaster's Department, or from the head of the division charged with the duty of furnishing such supplies within the required time, then it shall be lawful for the commanding officer of such army, or detachment, to order the chief quartermaster of such army, or detachment, to procure such supplies during the continuance of such

emergency, but no longer, in the most expeditious manner, and without advertisement; and it shall be the duty of such quartermaster to obey such order, and his accounts of the disbursements of moneys for such supplies shall be accompanied by the order of the commanding officer, as aforesaid, or a certified copy of the same, and also by a statement of the particular facts and circumstances, with their dates, constituting such emergency."

We think that a careful comparison of what is said by Mr. Justice Nott (Record, p. 21) with what is said by Chief-Justice Drake, (Record, p. 28,) will enable the court to see that certain facts, shown in the statement that precedes this argument, are inconsistent with the notion that an advertisement was necessary, as insisted on the other side: and this, whether we consider the case as falling under the act of March 2, 1861, or as governed by the act of July 4, 1864.

Chief-Justice Drake (Record, p. 28) remarks that "the "claimant's counsel earnestly objected" to the last-named statute "being considered to have any bearing on the case." He ought to have remembered that there was a difference of opinion as to that point between one of plaintiff's counsel and another; but that matter need not be considered now. Assuming that the statute has full application to the case, we think that Mr. Justice Nott correctly holds, that, in the circumstances, no advertisement was required.

It may be proper to add, however, that, assuming that the act of '64, *within the scope of its provisions*, superseded or suspended that of '61—concerning which assumption there has been some difference of views—it seems quite clear to us that the contract of July 18, 1864, is brought by the findings in the Court of Claims within the authority given by the above-quoted section of the act of '64.

One finding is, in effect, that the commanding general ordered the quartermaster to make such a contract, (find-

ing VI, Record, p. 13,) and another finding (No. IX, Record, p. 15) refers to an exhibit showing the approval alleged in the petition.

By the first section of the last-named law, provision is made for the establishment, *in the office of the Quartermaster-General*, of nine divisions, to exist during the rebellion and one year thereafter, each to be in charge of a competent officer of that department, to be assigned to such duty by the Secretary of War; and requires those officers, under rules to be prescribed by the Quartermaster-General, to transact the business of their respective divisions as afterwards provided in said section. The officer in charge of the *fifth* division has charge of the purchase, procurement, issue, and disposition of forage and straw for the army.

Section 2 provides that the heads of divisions shall, under the direction of the Quartermaster-General, from time to time advertise for proposals; but no provision is made as to the *time* of advertisement. Necessarily, however, as the Court will judicially notice, a considerable time would be required in order to effect the objects of the law—not less, it is quite safe to say, than thirty days.

We maintain also that the fact that it was not till the 30th of July, 1864, that Quartermaster-General Meigs (see General Orders, No. 30) promulgated the act of Congress here referred to, in General Orders, for the information of the officers and agents of the Quartermaster's Department, is a matter to be judicially noticed by the Court, because it is a matter of public history. It is also matter of public history that the organization contemplated by the already-cited provisions of said statute was not made till the following December. (See General Orders, No. 62, dated December 23, 1864.)

Section 3 provides for the establishment of depots, from time to time, at places convenient to the principal armies

in the field, but allows the Quartermaster-General, or the heads of divisions, to cause supplies to be sent from the place of purchase directly to the quartermasters of the commands for whose use the supplies are procured, where it may be more economical or advantageous to do so.

Where supplies are not so furnished, and when they cannot be procured from any established depot of the Quartermaster's Department, or from the head of the divisions charged with the duty of furnishing them, within the time required by an emergency, as contemplated by clause first of section 4, the power of the Commanding-General is called into exercise. The findings clearly show that this must have happened in the case of the contract here in question.

That the action of the Commanding-General was, in point of fact, such as the law sanctioned, and that the subordinate action of Capt. Durbin was, in point of fact, such as the law authorized, is, we think, sufficiently set forth in the opinion of Mr. Justice Nott: which, indeed, as to the second cause of action, is admirable in method and expression.

We refer, however, to the case of *Mowry* v. *U. S.* (2 C. C., 68,) in which the Court said: "A contract to construct " 100 railroad cars, 50 to be delivered in 18 days, and 50 " in 30 days, is an *immediate* performance within the meaning of the act."

III.

I. The questions raised by the counter-claim and set-off of defendants are so fully discussed in the opinion of Mr. Justice Nott, (Record, p. 24,) in that of Chief-Justice Drake, (Record, p. 33,) and in that of Mr. Justice Richardson, (Record, p. 35,) that it may seem unnecessary to dis-

cuss those questions in this argument. But we feel bound to offer some suggestions on that subject.

Nothing can be conceived more forcible and conclusive than the general reasoning of Mr. Justice Nott as to the finality of the settlements with and payments to McKee, and nothing more inconsistent with that reasoning than the judgment of the Court, that "the defendants are entitled to "recover upon their counter-claim the money paid to the "claimant for hay destroyed under the contract of June "20, 1864." For every ton of hay cut by the claimant and put into proper state by him, and by him delivered, or be prepared to be delivered, he was entitled to receive a sum, fixed by his contract. The destruction of it by the rebels, on account of the breach of contract by the defendant, clearly entitled him to be paid the proper compensation; and even if there had been an irregularity in the mode of paying him, the equitable principles which govern counter-claims and set-off would secure him against any recovery of that money by defendants, in this action, under either counter-claim or set-off. But we say that there was no irregularity and no other wrong whatever in his receipt of compensation for that destroyed hay.

As to the nature and effect of governmental settlement and voluntary payment generally, we propose to make a few suggestions, which, we trust, may be of service to all interests which ought to be considered in this case.

"An act to provide for the prompt settlement of ac-"counts," (approved March 3, 1817, see Revised Statutes, p. 39, § 236,) provides that "*all claims* and demands *what-*"*ever* by the United States or against them, and all "*accounts whatever*, in which the United States are con-"cerned, either as debtors or creditors, shall be settled "and adjusted in the Treasury Department."

Nothing can be plainer than the meaning of these very

simple words. Construction never had the right, and never can successfully usurp the right, to pare away their true significance. "To settle" must still be *to settle*, though construction should pile hills on mountains of decisions to the contrary; and "to adjust" must still mean to *effect adjustment*, though our volumes of Reports should be crowded with decisions holding that there is adjustment which does not adjust.

The care this court has taken not to make decisions tending to impair the trust of power to the Executive Department of the Government is worthy of the highest commendation. If, in any instance, a decision has been made in which that care may not be visible, we can only regret the imperfection of all human action, and indulge the hope that such a precedent will not be followed.

With unfeigned respect we venture to suggest that the extremely interesting dissenting opinion of Mr. Justice Richardson in the court below cannot be justly credited with tendency to maintain the due regard for the settling and adjusting power provided for by the just-quoted act. That the opinion is *ingenious* is not to be denied; but it appears to us to make a studied effort rather to *restrict* than to *respect* the meaning of the statute under notice, and the statutes which have been associated with that act. We cannot imagine the author of it as Secretary of the Treasury agreeing to its most distinctive propositions.

The course of it presents this language, equally unjust, it seems to us, to the accounting officers and to the claimant in this case:

"Moreover, the claimant does not acquiesce in the settlement, but brings this action to recover an amount beyond what has been allowed and paid to him. He cannot, therefore, in law or justice, well complain if the United States on their part, no longer acquiesce in the

payment, and, in defending themselves, at the same time seek to recover back the money paid to him without authority of law, by their special agents, acting beyond the limits of their jurisdiction. Had the claimant himself not disturbed the settlement by bringing the defendants into this court, the United States would no doubt have abided by the action of their officers, as they have done before in hundreds of cases which must have occurred in the nature of things during the past eighty years; and were, in the course of the almost countless, multifarious, and complicated accounts which have been adjusted and settled in the departments, wherein the executive officers have acted upon interpretations of statutes, and views of the law, and of their own powers and duties, honestly and fairly arrived at, as we believe they were in this case also, but which the courts, after arguments by persons learned in the law, and more thorough consideration, would be constrained not to uphold."

It was not to disturb a settlement of any kind that those proceedings were commenced. The record is our witness. There is the petition; there are the amendments; where is to be found the indications of a purpose to disturb a settlement?

The claimant, learning through his counsel that some portions of his claim could be adjusted only through the action of the Court of Claims, resorted to that Court. Some other portions of his claim had been already settled, and yet others were adjusted after he commenced this action. Nothing has been opened up by him that ever has been closed by settlement.

Ingenious as the notion under notice is, it will not bear examination.

We submit, moreover, that the learned Judge ascribes too much to *acquiescence* and too little to the *settlement* itself.

The settlement cannot depend for its conclusiveness on

acquiescence. Nor can its conclusiveness depend on *payment*, we conceive. That payment, voluntarily made by proper paying officers, is fully binding on the Government, just as it is on individuals, we must maintain as long as we are free to do so, since it seems to us good law; but that a settlement by the accounting officers may *bind the Government* without either payment or acquiescence, save the acquiescence involved in the act of accepting the settlement, appears to us beyond the reach of reasonable question. It was not in claimant's *power* to disturb the settlements he had obtained before he brought this suit; and certainly he never has attempted to disturb either them or the settlement made since the suit was brought. This is conclusively shown by the amended petition, which distinctly manifests the claimant's full assent to the settlements he had obtained. The claim set up in the amended petition is for matters not embraced in those settlements at all, being confined to a claim for damages for profits.

The quoted language of the act of March 3, 1817, is clearly broad enough to support the actions of the accounting officers in making the settlements which the counter-claim and set-off are designed to overthrow. It is within the truth to affirm that thousands of like settlements, in like cases, have been made by the Third Auditor and Second Comptroller, and that payments have been made pursuant to such settlements by the defendants, with the approval of the heads of the several Executive Departments of the Government interested in the disposition of the claims thus settled and paid.

In *U. S.* v. *MacDaniel*, (7 Peters, 14,) the Court say: "It is insisted that as there was no law which authorized the "appointment of the defendant, his services can constitute "no legal claim for compensation, though it might author-"ize the equitable interposition of the legislature. That

" usage, without law or *against law*, can never lay the " foundation of a legal claim, and none other can be set " off against a demand by the Government.

" A practical knowledge of the action of any one of the " great departments of the Government must convince " every person that the head of a department, in the dis- " tribution of its duties and responsibilities, is often com- " pelled to exercise his discretion. He is limited in the " exercise of his powers by the law; but it does not follow " that he must show a statutory provision for everything " he does. No government could be administered on such " principles. To attempt to regulate, by law, the minute " movements of every part of the complicated machinery " of government would evince a most unpardonable ignor- " ance on the subject. Whilst the great *outlines* of its " movements may be marked out, and limitations imposed " on the exercise of its powers, there are numberless " things which must be done that can neither be anticipated " nor defined, and which are essential to the proper action " of the Government. Hence, of necessity, usages have " been established in every department of the Government, " which have become a kind of common law, and regulate " the rights and duties of those who act within their re- " spective limits. And no change in such usage can have " a retrospective effect, but must be limited to the future. " *Usage cannot alter the law, but it is evidence of the* " *construction given to it, and must be considered as bind-* " *ing on past transactions.* * * *

" It must be admitted that there was no law authorizing " the appointment of the defendant, nor was it considered " necessary that there should be a special statutory provision " on the subject. * * * It would seem, (p. 16,) there- " fore, whether the claim of the defendant be varied in " reference to the services performed, or the long sanction

" which has been given to them by the Navy and Treasury " Departments, its justice is unquestionable. The Govern- " ment does not deny the performance of the services by the " defendant, nor that they do in equity entitle him to com- " pensation; but, as his appointment was *without legal* " *authority*, it is insisted he can obtain relief only by " application to Congress. An action of *assumpsit* has " been brought by the Government to recover from the de- " fendant the exact sum which, in equity, it is admitted he " is entitled to receive, for valuable services rendered the " public, in a subordinate capacity, under the express " sanction of the head of the Navy Department This sum " of money happened to be in the hands of the defendant, " and the question is, whether he shall, under the circum- " stances, be required to surrender it to the Government, " and then petition Congress on the subject.

" A simple statement of the case would seem to render " proper a very different course. * * *

" For more than *fifteen years* the claim has been paid " for similar services, and it is now too late to withhold it " for services actually rendered. It would be a novel " principle to refuse payment to the subordinates of a de- " partment, because their chief, under whose direction they " had faithfully served the public, had mistaken his own " powers, and had given an erroneous construction of the " law. But the case under consideration is stronger than " this. It is not a case where payment for services is de- " manded, but where the Government seeks to recover " money from the defendant, to which he is equitably enti- " tled for services rendered."

The case under consideration is much stronger than the one just cited. The claims of McKee, as shown by the settlements, (Record, p. 16–17,) were for compensation for hay cut and stacked, cut and in the process of being stacked,

and hay cut and abandoned by military orders, and for the value of property destroyed, by the rebels, while being used in preparing hay; in other words his claims were for work and labor performed and expenditures made under his contracts, which were, without fault on his part, broken by the Government. In this class of cases allowances, as compensation for labor performed, and as reimbursement for the value of property destroyed or other proper expenditure incurred and lost, have been adjudged and made by the Second Comptroller, ratified and approved by the Secretary of War, and paid by the Government *for more than half a century*.

This long usage should be regarded and accepted as the proper construction of sections 236–273 and the third clause of section 277 of the Revised Statutes, as to the powers and duties of the Second Comptroller in making such settlements.

His functions are, undoubtedly, judicial in these and in numerous other cases which come before him for decision and adjustment, as appears on almost every page of the Digest of his decisions printed and distributed by the Government to all of its Executive Departments for their instruction and guidance.

Mr. Justice Richardson well says that "a decision implies "more than ministerial duties, and calls for a determination "by the Comptrollers of every question which may be "raised upon the accounts and balances as stated and cer- "tified by the Auditors, whose whole proceedings are sub- "ject to revision by the Comptrollers. * * * To some "extent, therefore, the Comptrollers are quasi-judicial offi- "cers." (Record, p. 37.)

See *Vanderheyden* v. *Young*, 11 Johns., 158.

Digest of Decisions of Comptroller, (ed. of 1865,) paragraphs 328, 330, 337, 350, 375, 376.

Opinions of Atty's Gen., vol. 2. p. 408; vol. 3, p 280.

Attorney-General Browning said in 1868: "It has been "repeatedly held that where an account has once been duly "adjusted, settled, and closed by the proper officers, with "a full knowledge of the facts, and where no errors in "calculation have been made, it cannot be reopened with- "out express authority of law, and must be regarded as "final and conclusive. No subsequent decision upon a "doubtful or controverted question of law, essentially "modifying a prevailing rule which was applied to the set- "tlement of an account, would authorize the reopening of "it with a view to a readjustment of it in accordance with "such decision." (12 Opin. Atty. Gen., 386.)

In *U. S.* v. *Jones*, (8 Peters, 375,) Mr. Justice McLean expressed decidedly important views as follows: "The ac- "counting officers of the Treasury act upon the accounts, "and give the credits as entered their official sanction. "The vouchers of an individual are all submitted to these "officers, and their decision has always been considered "as conclusive upon the Government, but not so as against "the individual. The law expressly provides that rejected "items may be allowed by the Court."

As remarked by Mr. Justice Richardson, (Record, p. 39,) Judge McLean here evidently refers to the provisions now incorporated into the Revised Statutes, sections 951, 952. The first of these sections provides that in all suits brought by the United States against individuals no claim for a credit shall be admitted, upon trial, except such as appears to have been presented to the accounting officers of the Treasury for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the

United States, or by some unavoidable accident. The next section makes a like provision as to credits in suits under postal laws.

Mr. Justice McLean, in *U. S.* v. *Jones*, *supra*, proceeds as follows: "In the performance of their official duty, the Treasury officers act under the authority of law; their acts are public and affect the rights of individuals as well as of the Government. In the adjustment of an account they sometimes act *judicially* and their acts are all recorded in the books and files of the Treasury Department so far as they act strictly within the rules prescribed for the exercise of their powers; their decisions are in effect final, for, if an appeal be made, they will receive judicial sanction."

Mr. Justice Richardson supposes reference to be here made to section 886 of the Revised Statutes, bringing up an act approved March 3, 1797, and the act of March 3, 1817, and providing, among other things, for the validity and effect of transcripts of papers connected with certain settlements of accounts. (Rev. Stat., p. 167.)

The importance of the words "so far as they act strictly "within the rules prescribed for the exercise of their "powers" is not overlooked. But here we may well adopt the following words of Mr. Justice Nott:

"It is manifest that so broad a rule as is contended for by the defendants would be holding, in effect, that the accounting officers of the Treasury are the agents of the Government so long as their mistakes of law are favorable to their principal, but that their agency ceases *eo instanti* whenever they are incidentally against the Government in the difficult task of construing the statutes of the United States. The result of such a rule would often be that, as to one-half of a settlement, the accounting officers would be the agents, and the settlement final; that, as to the other half, it would be binding upon the creditor if he took the money, but not upon the debtor, and that, practi-

cally, mutuality and finality would be stripped from all Treasury adjustments." (Record, p. 25.)

This absurdity would be diminished if the Government were bound by acts of limitation; but, in any view, it would be very great.

This case is not at all like that of McElrath, recently decided in the Court of Claims. Whether the guarantee in the contract of June 20, 1864, was valid or invalid, the contract itself was not a nullity. It created contract relations between McKee and the United States. Out of those relations grew the necessity of settlement. According to the views of the Court of Claims, there were no legal relations whatever between McElrath and the Government at the time of the supposed settlement, then in question. Then there are the other differences pointed out by Mr. Justice Nott. (Record, p. 24.)

In any view that we can take of the transactions between McKee and the United States, the settlements of which the character is drawn in question by the counter-claim and set-off, are absolutely final and conclusive.

II. As to the effect of payment, we shall say but a few words.

The payments here in question were completely *voluntary*, and, as an action would not lie on them, they cannot be recovered here.

(*Schlesinger's Case*, 1 C. C., 16; *Folsom* v. *U. S.*, 4 C. C., 366; *Mays* v. *Cincinnati*, 1 Ohio State Rep., 268; *Child, Pratt & Fox* v. *U. S.*, 7 C. C., 209; *Clyde's Case*, Ib., 262; *Comstock* v. *U. S.*, 9 C. C., 141.).

There was neither mistake of law nor mistake of fact in the payments made to claimant.

III. If the defendants had been dissatisfied with the ad-

justment of the accounting officers, they could have referred the whole case to the Court of Claims. Not having taken that course, they ought not to be permitted now to question that adjustment.

On the whole, it seems to us quite clear that not the judgment actually given in this case, but just the judgment asked by claimant, ought to have been given in the Court below. We ask that judgment here.

S. W. JOHNSTON,
R. B. WARDEN,
Counsel for McKee.